Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY, a California corporation, and PACIFIC TELESIS GROUP, a Nevada corporation,

Petitioners,

vs.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; and CAROL JANE TIDWELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Retirement benefits are a mandatory subject of bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (the "NLRA"). Thus, an employer must bargain collectively over them with only the chosen representative of its employees. An employer violates the NLRA when it unilaterally institutes changes in retirement benefits for represented employees.

Ignoring the inherent conflict with the NLRA, in this case the Ninth Circuit held that when Pacific Bell began "serious consideration" of improved retirement benefits in the course of preparing for negotiation of a new collective bargaining agreement, petitioners had a duty to respond to inquiries from employees "irrespective of the pendency of collective bargaining," by telling them "accurately and straightforwardly" about what Pacific Bell was considering proposing to the union. Contrary to other circuits, the Ninth Circuit also held that an employer that is a plan administrator has a duty not to actively misinform plan participants and beneficiaries about the likelihood of future retirement benefits, even before "serious consideration" occurred.

The questions presented are: (1) whether the "serious consideration" disclosure duty under ERISA pertaining to a future ERISA benefit should be applied in the context of collective bargaining, notwithstanding that it conflicts with NLRA prohibitions and policies by interfering with the collective bargaining process; and (2) whether a misrepresentation pertaining to a proposed ERISA benefit made prior to "serious consideration" can be "material" to constitute a violation of fiduciary duties.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Pacific Bell Telephone Company's corporate parent is Pacific Telesis Group, which is not a publicly held company. No publicly held company owns 10% or more of Pacific Bell Telephone Company's stock.

Petitioner Pacific Telesis Group's corporate parent is SBC Communications Inc., a publicly held company. No other publicly held company owns 10% or more of Pacific Telesis Group's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the amended opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's amended opinion and order denying rehearing is reported at 238 F.3d 1048 (9th Cir. 2001) and is reproduced in App. A at 1a-14a. The Memorandum Decision and Order of the United States District Court for the Southern District of California granting petitioners' summary judgment motion is unreported and is reproduced in App. B at 15a-19a. The Ninth Circuit's original opinion in this case is reported at 189 F.3d 982 (9th Cir. 1999) and is reproduced in App. C at 20a-33a.

JURISDICTION

The Ninth Circuit's amended opinion and order denying rehearing was issued on February 8, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, that are relevant to this petition are 29 U.S.C. §§ 151, 157, 158(a)(1), 158(a)(5), 159(a), and 1104(a)(1). They are reprinted in the Appendix D at 34a-37a.

STATEMENT OF THE CASE

Respondents are six former employees of petitioner Pacific Bell Telephone Company ("Pacific") whose

employment was governed by a collective bargaining agreement. Pacific participated in a pension plan sponsored and administered by petitioner Pacific Telesis Group. Respondents were participants in that pension plan. The Communications Workers of America (the "Union") was the duly elected representative of respondents' bargaining unit.

In May 1995, Pacific offered several employees, including respondents, the opportunity to elect early retirement under a collectively bargained early retirement program called ERI Phase II. The terms of ERI Phase II required those who received the May offer to make the election between June 1 and June 30, 1995, and retire as of July 15, 1995. ERI Phase II increased an employee's total retirement payout by adding four years toward calculating the employee's service and four years toward the employee's age. Under the 1992 collective bargaining agreement, Pacific could offer ERI Phase II to work groups it selected any time from November 1, 1992, through the expiration of the agreement on August 5, 1995.

Respondents alleged that in considering whether to accept the early retirement offer, they asked their immediate supervisors if there might be other financial incentives offered in the future and were told there would be no better offers and there would definitely be no offers with a cash bonus. Respondents also alleged that Pacific represented that its financial condition was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up. Respondents elected to retire within the June 1995 timeframe, retired as of July 15, 1995, and were paid their early retirement benefits in accordance with the ERI Phase II plan.

On June 13, 1995, after months of preparations, Pacific and the Union began formal negotiations for a new three-year collective bargaining agreement. On June 15, the Union proposed a new 6+6 early retirement incentive with a

cash incentive of one year's pay and additional financial benefits. On June 16, Pacific proposed a Cash Balance Pension plan, which would have changed the basic plan design and given employees not yet close to retirement age more opportunity to leave with larger accrued pension benefits. On June 19, Pacific proposed a downsizing plan that included an enhanced 4+4 early retirement benefit plan with a 20% supplement in pension benefits through age 62 (the "ERB proposal").[1] The ERB proposal was just one part of a package of proposals Pacific had prepared regarding force balancing. These proposals were designed to offer improved benefits to employees to obtain Union concessions on an employment security commitment that appeared in the previous collective bargaining agreements. The Union's 6+6 proposal and Pacific's ERB proposal both provided more benefits to selected work groups than the ERI Phase II. Although it was not limited to selected work groups, the Cash Balance Pension plan did not provide *any* early retirement enhancements comparable to the 6+6 or the ERB proposals.

On August 7, Pacific and the Union tentatively agreed to a new ERB consisting of a 4+4 early retirement plan with a 30% supplement in pension benefits through age 62. On August 8, after negotiating for nearly two months on many different issues, Pacific and the Union agreed to the terms of the 1995 collective bargaining agreement, which provided Pacific could offer the new ERB to those work groups it selected for force balancing. Since Pacific carefully selected work groups for force balancing,

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[1] The various proposals being negotiated caused the Union to have to weigh conflicting interests of at least two groups of represented employees with differing financial security interests: (a) those with 10-20 years of service who would likely benefit more from the Cash Balance Pension proposal, and (b) those with more than 20 years of service who would likely benefit more from the ERB proposal, if they were in a selected work group. Both proposals were on the table throughout respondents' election period.

there was no guarantee Respondents' former work group would be selected. However, in September 1995, it was selected and the ERB was offered to that group in October 1995.

Respondents brought this action under ERISA, alleging that Pacific misled them by telling them in June that no better early retirement plan would be offered when Pacific was then negotiating a better early retirement plan with the Union. The alleged misrepresentations included statements made by respondents' supervisors, who had no knowledge of what Pacific would be proposing in collective bargaining.

THE PROCEEDINGS BELOW

The district court granted Pacific's summary judgment motion. Relying on *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("*Fischer II*"), the court held Pacific was not obligated to disclose collective bargaining negotiations to respondents because the better early retirement package was not being "seriously considered" at the time respondents made their decision to retire. The court found no "serious consideration" because: (1) when respondents elected to accept ERI Phase II, Pacific did not know what the terms of any future early retirement plan would include since the Union and Pacific were merely negotiating the next contract; (2) Pacific had no right to unilaterally change a term of employment until it completed the bargaining process with the Union; and (3) Pacific could not predict how the negotiations would resolve. App. B at 18a. The court also found that even if there were a duty to disclose, it is limited to situations that will not interfere with the substantive aspects of the collective bargaining process. Thus, it concluded petitioners could not communicate with individual employees about the potential terms of the enhanced retirement plan because such communications

would have interfered with the Union's role as the employees' exclusive bargaining agent. *Id.*

The Ninth Circuit reversed. Relying on its ruling in *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929 (9th Cir. 1999) ("*Bins I*"),[2] it held in its original opinion that when an employer that is an administrator of an ERISA plan ("employer-fiduciary") gives serious consideration to a proposal to change retirement benefits, it has an affirmative duty to disclose (even in the absence of any inquiry) information about the proposal to plan participants and beneficiaries to whom the employer knows, or has reason to know, the information is material. *Wayne*, 189 F.3d at 987.

On Pacific's petition for rehearing and rehearing en banc, the Ninth Circuit stayed the matter pending en banc rehearing of *Bins v. Exxon Co. U.S.A.*

In *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) ("*Bins II*"), the Ninth Circuit rejected the affirmative disclosure requirement of *Bins I*, and adopted a disclosure standard based on *Fischer II* – an employer-fiduciary is required only to answer employee inquiries about future plan changes that are under "serious consideration". *Bins II*, 220 F.3d at 1045.

On February 8, 2001, the Ninth Circuit issued its amended opinion in this case. (App. A at 1a-2a). Applying *Bins II* and the *Fischer II* standard, it held that in a unionized work setting, "**irrespective of the pendency of collective bargaining,**" when an employer-fiduciary gives "serious consideration" to a proposal to change retirement benefits and is asked a question by a plan participant or beneficiary, it must "'respond completely and truthfully about the

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[2]Unlike the facts here, the terms of the ERISA welfare benefit plan about which the plaintiff in *Bins* had inquired were already finalized and could be implemented by the employer without consulting with the union.

present state of affairs - that is, whether serious consideration has begun,'" and communicate "'the potential amendment accurately and straightforwardly.'" *Id.* at 1050, 1055-56 (App. A at 3a, 14a) (emphasis added) (citing *Bins II*, 220 F.3d at 1048, 1053). The Ninth Circuit stated that disclosure was required when there was **"even the realistic possibility"** of improved benefits. *Id.* at 1054 (emphasis added) (citing *Drennan v. General Motors Corp.*, 977 F.2d 246, 251-52 (6th Cir. 1992)). The court rejected Pacific's argument that this disclosure requirement is unworkable and inappropriate in the collective bargaining context, where the employer does not unilaterally control what enhanced benefits may be adopted or when they may be made available. It dismissed such concerns with the bare observation that the disclosure requirement does not "necessarily conflict" with an employer's obligation not to bargain with individual employees. *Id.* (citing 29 U.S.C. § 159(a)).

The Ninth Circuit held "serious consideration takes place when '(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.'" *Id.* (quoting *Bins II*, 220 F.3d at 1048). It then concluded it was unclear from the record precisely when serious consideration began in this case, but it was "at least clear that it had already occurred when Pacific presented its proposed ERB to the Union during collective bargaining on June 19, 1995." *Id.* (App. A at 10a). Thus, it reversed and remanded the case to the District Court to determine "the date on which Pacific began 'serious consideration' of improved retirement benefits." *Id. at* 1055-56.

Contrary to the holding in *Fischer II* and the holdings of several other circuits, the Ninth Circuit also held petitioners' fiduciary duty is not confined to providing truthful answers to questions once serious consideration has begun; rather, as fiduciaries, they have "a duty not to

actively misinform plan participants and beneficiaries [about future ERISA benefits being considered], whether or not there has been serious consideration." *Id.* at 1055 (App. A at 12a-13a) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997)). This holding makes *any* misrepresentation about potential changes to benefit plans actionable, notwithstanding that other circuits have adhered to the general rule that the misrepresentation must be "material," and have held that "serious consideration" is the "crux of the inquiry" of whether a misrepresentation is "material." *See, e.g., Fischer II*, 96 F.3d at 1538.

REASONS FOR GRANTING THE WRIT

In light of the significant number of employers with union-represented employees and the far-reaching impact the Ninth Circuit's decision will have on all collective bargaining, the question of whether the "serious consideration" disclosure requirement may properly be applied in the collective bargaining context is a question of broad national importance that should be addressed by this Court.

In nearly all cases, the "serious consideration" disclosure requirement has been applied to non-union employees.[3] When it was applied to union employees, it was not applied in the context of collective bargaining.[4] In many of the opinions, including those involving union employees, courts have specifically noted that care must be taken to ensure that application of the disclosure

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[3] *See, e.g., Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997) (*"Vartanian II"*)' *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997); *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir. 1997); *Fischer II*, 96 F.3d 1533 (3d Cir. 1996); *Wilson v. Southwestern Bell Tel. co.*, 55 F.3d 399 (8th Cir. 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994).

[4] *See Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992); *Adamczyk v. Lever Bros. Co.*, 33 F. Supp. 2d 679 (N.D. Ill. 1998).

requirement does not interfere with the substantive aspects of the collective bargaining process.[5]

By applying the "serious consideration" disclosure requirement in the context of collective bargaining in this case and thereby requiring petitioners to disclose potential retirement benefit changes even before Pacific made a proposal about the changes in bargaining, the Ninth Circuit has done exactly what other courts have recognized must *not* be done – it has applied the disclosure requirement in a manner that interferes with and has a debilitating effect upon the collective bargaining process. Its ruling conflicts with prohibitions and policies under the NLRA. The required disclosures will stifle employer preparations for bargaining and consideration of alternatives for improved benefits, deprive an employer of concessions it is entitled to reserve for the bargaining table and thereby leave the employer with no room to negotiate, interfere with the union's role as exclusive bargaining agent, and undermine the union's role and thereby interfere with the right of self-organization by making it appear to employees that there is no necessity for a collective bargaining agent. It will also hurt participants and beneficiaries by discouraging employer proposals to improve benefits.

Furthermore, no ERISA policy is furthered by the extension of the serious consideration rule to the collective bargaining context. Since an employer cannot lawfully implement retirement benefits without union approval, employees cannot be blindsided by changes in their retirement benefits, and once an employer discloses to the union proposed changes to the benefits, the employees are

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[5] *See, e.g., Fisher II,* 96 F.3d at 1539 (fiduciary's duty to answer participants' questions forthrightly "does not require the fiduciary to disclose its internal deliberations nor interfere in the substantive aspects of the collective bargaining process"); *Drennan,* 977 F.2d at 251 (6th Cir. 1992) (same).

imputed to have knowledge of them because the union is their agent. In addition, because an employer cannot implement changes in benefits without union approval, the serious consideration standard cannot be met in the context of collective bargaining.

The writ should also be granted to resolve the conflict in the circuits regarding whether a plan participant or beneficiary can establish a breach of fiduciary duty claim under ERISA based on a misrepresentation concerning a future enhanced ERISA benefit that is made prior to "serious consideration." Contrary to the majority of the circuit courts, only the Second Circuit and the Ninth Circuit have held that a misrepresentation about a future benefit made prior to "serous consideration" can be "material" to establish a breach of fiduciary claim.

I. AS APPLIED BY THE NINTH CIRCUIT, THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT WILL HAVE A DEBILITATING EFFECT ON THE COLLECTIVE BARGAINING PROCESS; THUS, THE WRIT SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE REQUIREMENT APPLIES IN THE CONTEXT OF COLLECTIVE BARGAINING.

The Ninth Circuit's application of the "serious consideration" disclosure requirement directly interferes with the collective bargaining process. No court has stretched the "serious consideration" disclosure duty as the Ninth Circuit did here. Indeed, with the two exceptions discussed below, the duty has not been applied to union employees.

The roots of the serious consideration doctrine are generally traced to *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). There, former management-level

employees alleged that their employer had made false representations concerning the future availability of an ERISA severance plan. Noting that previous breach of fiduciary duty cases involved misrepresentations regarding existing ERISA plans, the Sixth Circuit held that a misrepresentation concerning a prospective ERISA plan could give rise to liability if the prospective benefit was under "serious consideration." *Id.* at 1163-64. It did not, however, define when "serious consideration" occurs.

Most of the decisions following *Berlin* have similarly involved non-union employees.[6] In several of these opinions, the courts noted that the disclosure requirement does not require an employer to disclose its "internal deliberations" nor interfere with the substantive aspects of the collective bargaining process. *See, e.g., Fischer II,* 96 F.3d at 1539; *Mullins,* 23 F.3d at 669; *Fischer I,* 994 F.2d at 135.

None of the cases that applied the doctrine to union employees involved collective bargaining. For example, in *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), the ERISA plan about which the employees had inquired was already in effect and the employer could, with union assent, elect to offer it to those employees who agreed to terminate their employment, forfeit their seniority status, and relinquish all vested retirement benefits and post-retirement health care benefits. *Drennan,* 977 F.2d at 251. The employer was not in the process of bargaining with the union about whether the plan should be adopted or about

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[6] *See Vartanian II,* 131 F.3d 264; *Hockett v. Sun Co., Inc.*, 109 F.3d 1515 (10th Cir. 1997); *Ballone,* 109 F.3d 117 (2d Cir. 1997); *Muse v. IBM,* 103 F.3d 490 (6th Cir. 1996), *cert. denied,* 520 U.S. 1240 (1997); *Fischer II,* 96 F.3d 1533 (3d Cir. 1996); *Pocchia v. NYNEX Corp.*, 81 F.3d 275 (2d Cir. 1996); *Wilson,* 55 F.3d 399 (8th Cir. 1995); *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488 (10th Cir. 1995); *Mullins,* 23 F.3d 663 (2d Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994) (*" Vartanian I"*); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993), *cert. denied,* 510 U.S. 1020 (1993) (*" Fischer I"*); *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993), *cert. denied,* 510 U.S. 1020 (1993).

what the terms of the plan should be. Thus, the ruling requiring the employer to disclose to its union members the fact that it was considering offering the plan as an option would have had little, if any, impact on the collective bargaining process. The court specifically noted that the disclosure requirement "does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process." *Id.* at 251 (*citation omitted*).

Similarly, in *Adamczyk v. Lever Bros. Co.*, 33 F. Supp. 2d 679 (N.D. Ill. 1998), the court noted that "in applying [the serious consideration] standard when a CBA is involved, care must be taken that the standard is not construed in a manner that conflicts with NLRA prohibitions on unfair labor practices," and concluded there was no such problem there because the misrepresentations that were made subsequent to "serious consideration" occurred *after* an initial agreement had been reached with the union. *Id.* at 687.

A. The Ninth Circuit's Ruling Raises Issues of Broad and Recurring Importance Because it Conflicts with Well-Settled Bargaining Principles and Policies Under the NLRA.

> The NLRA was enacted to give employees the right to organize and to require employers to collectively bargain in an effort to avoid "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce .... 29 U.S.C. § 151.

Under the NLRA, representatives selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be "the exclusive representatives . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

. . . ." *Id.* § 159(a). The NLRA provides that the employer and the representative of the employee have an obligation to bargain collectively, i.e., to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. *Id.* § 158(d). *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). ERISA benefit plans that affect union-represented employees are mandatory subjects of collective bargaining. *See United Brick and Clay Workers of America v. International Union or Dist. 50*, 439 F.2d 311, 314 (8th Cir. 1971); *Pittsburg Plate Glass Co. v. NLRB*, 427 F.2d 936, 941 (6th Cir. 1970), *aff'd sub nom Chemical & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971); *T.T.P. Corp.*, 190 NLRB 240, 244 (1971).

Collective bargaining requires free and uninhibited exchange of proposals and counter-proposals between the employer and the union. However, the NLRA does not require that the parties agree. *See* 29 U.S.C. § 158(d); *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. 477, 487 (1960). Thus, the making of a proposal by the employer does not mean the union will agree to the proposal, or even that a modified proposal will be agreed to. It merely means the employer and the union will discuss the proposal.

The bargaining process is a series of tradeoffs and no proposal is examined in isolation. That is why a central principle of collective bargaining is that no term of a collective bargaining agreement is final until agreement is reached on all terms and negotiations have closed. *See, e.g., United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985) (employer could not have breached its fiduciary duties with respect to a benefit plan that was being negotiated until the plan was adopted at the close of bargaining).

1. As Applied by the Ninth Circuit, the "Serious Consideration" Disclosure Duty Interferes with Employers' Rights Under the NLRA by Destroying Their Statutorily-Protected Right to Bargain Freely.

The disclosure requirement enunciated by the Ninth Circuit will chill the bargaining process and substantially harm an employer's bargaining strategy by requiring an employer to lay all of its cards on the table before the game begins. As noted by this Court in *NLRB v. Katz*, 369 U.S. 736, 745 (1962), "[a]n employer is not required to lead with his best offer; he is free to bargain." By complying with the Ninth Circuit's holding, an employer would in essence be required to lead with its best offer by disclosing it to its employees before it proposes it to the union and would thereby give up its right to bargain freely. *See Insurance Agents*, 361 U.S. 477, 488-89 ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system [of collective bargaining]."); *New York News, Inc. v. State of New York*, 745 F. Supp. 165, 168 (S.D.N.Y. 1990) (compelling parties to set forth "their bargaining positions will render them "unable to 'be fluid and change positions or make concessions without embarrassment or losing face.'").

For example, an employer could choose for strategic reasons to start the collective bargaining process with a less generous offer than the one to which it is ultimately willing to agree. If forced to adhere to the "serious consideration" disclosure requirement, the employer would be required to disclose to union members the offer it ultimately would agree upon before it is ready to make that proposal to the union, thereby depriving it of a concession it was entitled to reserve for the bargaining table. The net result is that the employer's statutorily protected ability to negotiate freely is compromised.

Moreover, having been forced to disclose its best proposals to union members early in the bargaining process, the employer would have no room to negotiate further. As a result, the union might contest whether the employer negotiated in good faith. *See NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134-35 (1st Cir. 1953) ("[W]hile the Board cannot force an employer to make a 'concession' on any specific issue . . . the employer is obliged to make *some* reasonable effort in *some* direction to compose [its] differences with the union") (emphasis in original).

Furthermore, an employer would be forced to disclose proposals it considered in preparing for bargaining that may never be proposed in bargaining. A well-prepared employer develops a variety of options before bargaining begins. For example, an employer who expects the union to demand improvements in retirement medical benefits would likely consider, as part of its preparation for bargaining, various options such as increased reimbursements, expanded eligibility, reduced co-payments, reduced employee contributions, etc. The possibilities are vast. The employer might agree to any of them under the right circumstances, but would not agree to all of them. The proposals the employer chooses to present at the bargaining table will depend upon the course of bargaining. If the union does not ask for improvements in retirement medical benefits, or asks for something else that is very expensive such as increased wages, the employer might not propose *any* of the options regarding enhanced retirement medical benefits. If the employer had to comply with the Ninth Circuit's ruling by disclosing every option it had seriously considered, it would lose control over its bargaining strategy.

In addition, under the Ninth Circuit's ruling, a union can obtain an employer's bargaining strategy simply by having potentially affected employees ask what benefit

changes are being considered. This effectively deprives employers of the ability to develop any kind of confidential bargaining strategy.

Even if the union does not ask that of its members, it will nevertheless learn about the employer's bargaining strategy. In *Bins II*, the Ninth Circuit concluded that if an interested employee inquires about a potential change after "serious consideration" has occurred, "it would not be a defense that supervisors were unaware of the status and thus responded ignorantly but truthfully to the employee's inquiry." *Bins II*, 220 F.3d at 1050 n.6. To comply with this ruling, employers will be required to disclose their negotiation strategy to each of its supervisors to ensure they have knowledge of each proposal to enable them to respond to inquiries. For many large employers, such as Pacific, this would mean thousands of supervisors and, regardless of the instructions given to them, some supervisors would inevitably pass the information on to the union members who are their subordinates even in the absence of inquiries.

2. As Applied by the Ninth Circuit, the "Serious Consideration" Disclosure Duty Interferes with Unions' Rights Under the NLRA.

a. It will interfere with the union's role as exclusive bargaining agent.

Applying the "serious consideration" disclosure duty in the context of collective bargaining will interfere with the union's role as exclusive bargaining agent and could expose the employer to potential unfair labor practice charges.

Section 9 of the NLRA provides that representatives designated or selected for the purposes of collective

bargaining by the majority of the employees in a unit appropriate for such purposes "shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U.S.C. § 159(a).

The National Labor Relations Board ("the Board") and the courts unanimously have recognized that an employer violates Section 8(a)(1) and (a)(5) of the NLRA if it engages in "direct dealing" with employees and thereby interferes in the collective bargaining process and in the union's role as the exclusive bargaining representative. *Americare Pine Lodge Nursing v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) (citations omitted). *See also Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944) (negotiating directly with employees concerning a mandatory subject of bargaining when negotiations with the union are pending violates Section 8(1) of the NLRA); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 735 (11th Cir. 1998) (employer's efforts to deal directly with employees outside of the normal channels of collective bargaining are per se violations of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act).

Improper direct dealing is characterized "by actions that persuade employees to believe that they can achieve their objectives directly through the employer and thus erode the union's position as the exclusive bargaining representative." *Americare Pine Lodge*, 164 F.3d at 875. (citation omitted). One way to frame the question of direct dealing is "whether the employer has chosen to deal with the Union through the employees, rather than with the employees through the Union." *Id.* (citation omitted).

The Ninth Circuit's opinion in this case provides that an employer *must* communicate directly with union-represented employees about proposed ERISA benefit

changes *before* communication to the union "irrespective of the pendency of collective bargaining." Contrary to this ruling, in *Detroit Edison Co.*, 310 NLRB 564, 564-65 (1993), the Board held that an employer had engaged in direct dealing when it presented to its employees the substance of a proposal *before* it presented the proposal to the union.

Furthermore, although an employer *may* disclose to its employees the terms of a proposal it has already made to the union (*see Americare Pine Lodge,* 164 F.3d at 875), mandatory disclosure is very different and would actually interfere with an employer's right to bargain freely. That right includes the right to decide whether and when to disclose to union members the details of its collective bargaining proposals as part of its bargaining strategy.

Forcing the employer to communicate proposals to union members could also harm the relationship between the employer and the union and impede negotiations by antagonizing the union. For example, it would prevent the employer and the union from agreeing not to disclose bargaining proposals outside of the bargaining table so that bargaining does not occur, or appear to occur, through the media. Indeed, Pacific and the Union had made such an agreement pertaining to their negotiation of the 1995 collective bargaining agreement.

Mandatory disclosure by management could also affect how both sides negotiate. Knowing that the details of every benefit proposal could be disclosed to union members, the employer and the union will in effect be performing for an audience, which will necessarily affect the substance of the proposals by each side and how they are presented.

b. It will undermine the union's role in the eyes of its members.

Employer disclosure of proposed changes in ERISA benefits could also undermine the union's role in the eyes of its members. Like a unilateral change in the terms and conditions of employment, it will "interfere with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *See NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (quoting *May Dep't. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

Prior to reaching an agreement with the union in collective bargaining and, in some cases, prior to the employer making a proposal during collective bargaining, union members would have knowledge of what the employer intends to propose in collective bargaining. This, in itself, may send a message to union members that they do not need the union because they can secure advantages greater than those the union can secure. This is especially so if the proposed benefit that was disclosed is not part of the new collective bargaining agreement.

For example, if an employer has "seriously considered" an exit incentive program worth $10,000,000 and intends to propose it in bargaining, but in negotiations learns it will be unable to reach an agreement on a separate issue such as wages without spending more and therefore does not propose the exit incentive program, disclosure about the program to union members prior to the close of bargaining could have a debilitating effect on the members' opinion of the union's role.

Similarly, suppose an employer proposes a $5,000,000 early retirement program for workers limited to a particular work group. The union counters with a proposal for the program to apply to all workers in the

company. The employer replies that the union can choose between the $5,000,000 program for workers in that particular work group or a $3,000,000 program that applies company-wide, because it would cost a great deal of money to shift and retrain workers if the program were company-wide. Since the employer would be required to communicate these proposals to the potentially-affected employees under the "serious consideration" disclosure requirement, whatever the union does will likely offend one segment or another of its membership, and thereby erode the union's bargaining role in the eyes of its members.[7] Moreover, since the employer's disclosure is causing this erosion, the disclosure could negatively impact the relationship between the employer and the union.

3. As Applied by the Ninth Circuit, the "Serious Consideration" Disclosure Duty Will Hurt Plan Participants and Beneficiaries.

The "serious consideration" disclosure requirement could also hurt plan participants in a unionized setting by discouraging employers from considering proposals to improve benefits and from developing a variety of options in preparation for bargaining, since potential tradeoffs and fall back positions considered for bargaining would have to be disclosed. This risk was recognized by the Third Circuit in *Fischer II,* 96 F.3d at 1541: "[I]mposing liability too quickly for failure to disclose a potential early retirement plan could harm employees by deterring employers from resorting to such plans." For the reasons discussed above, employers will be reluctant to seriously consider such

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[7]This example is very close to the facts in this case. Pacific first proposed a new Cash Balance Pension plan, which would have benefited short-term employees more than long term employees, and subsequently proposed an enhanced retirement program, which would have been better for certain longer term employees. Under the rule of this case, Pacific would have had to disclose both proposals in response to inquiries, creating inevitable dissatisfaction by some Union members.

proposals. Their only safe route would be to do nothing affirmative and simply respond to union demands. However, an employer could not safely develop alternative options to respond to union demands because each potential tradeoff and fallback position it considers would have to be disclosed. The result would be a stagnant, overly conservative approach to improving employee benefits.

Significantly, in *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989), the Ninth Circuit took a position contrary to its position in this case. There, the plaintiff had alleged his employer breached its fiduciary duty by failing to warn him that his pension benefits could be drastically reduced upon expiration of the existing collective bargaining agreement. Recognizing the inherent problems of attempting to predict the outcome of collective bargaining, the Ninth Circuit concluded it was enough that employees were aware from previous bargaining sessions that their pension benefits could be affected by the many possible outcomes of bargaining, and held the employer had no duty to disclose the obvious: that bargaining could result in a number of outcomes, some of which might negatively impact employees' pension benefits. Contrary to its holding in *Stahl,* a duty to disclose the obvious is precisely what the Ninth Circuit is imposing in this case through the "serious consideration" disclosure requirement.

B. The Ninth Circuit's Application of the "Serious Consideration" Disclosure Requirement in the Context of Collective Bargaining Does Not Further, and Might Undermine, ERISA Policy and is Unworkable.

1. Application of the "Serious Consideration" Disclosure Requirement Does Not Further any ERISA Policy Because Employees Are Already Protected by the Collective Bargaining Process.

The purpose of the "serious consideration" disclosure requirement is to protect plan beneficiaries from being blindsided by employer actions that are unilaterally and secretly implemented. *See, e.g., Bins II,* 220 F.3d 1042; *Fischer II,* 96 F.3d 1533. However, unilateral employer action is not a concern and is in fact a legal impossibility with respect to a benefit plan that is a mandatory subject of collective bargaining because the union and the employer share control. As previously noted, in the absence of a genuine impasse, an employer may not alter any ERISA benefit without the union's assent.

Disclosure is also unnecessary because the union, as their chosen bargaining agent, is charged with protecting its members' interests. Moreover, under the law of agency, the union's knowledge is imputed to its members. *See, e.g., Peel v. American Fidelity Assurance Co.,* 680 F.2d 374, 378 (5th Cir. 1982) (noting that the relationship between the plaintiff teacher and a voluntary association of teachers is analogous to the relationship between a union and a union member, "a relationship long described in terms of agency," the court held the association's knowledge of changes to an insurance policy it had obtained for the teachers was imputed to the plaintiff).

2. As Applied by the Ninth Circuit, the "Serious Consideration" Disclosure Duty Will Likely Mislead or Confuse, Rather Than Educate, Union Employees.

The Ninth Circuit requires disclosure when there is "even the realistic possibility" of improved benefits and stated that "serious consideration" must be determined "irrespective of the pendency of collective bargaining." *Wayne*, 238 F.3d at 1054-56 (App. A at 11a-14a). Requiring disclosure of any "realistic possibility" of a benefit increase is at odds with one of the core rationales for the "serious consideration" doctrine -- that a high standard of "serious consideration" is necessary to ensure that only material disclosures are required. As noted by the Third Circuit in *Fischer II*, 96 F.3d at 1539:

> Every employee has a need for material information on which that employee can rely in making employment decisions. Too low a standard could result in an avalanche of notices and disclosures. For employees at a company . . . which regularly reviews its benefits plans, truly material information could easily be missed if the flow of information was too great. The warning that a change in benefits was under serious consideration would become meaningless if cried too often.

Other courts have recognized that the "serious consideration" doctrine does not apply in all circumstances, *e.g.*, to an ERISA benefit plan that has not yet been adopted. As noted in *Muse*, 103 F.3d at 494:

> Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that

> "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R. Rep. No. 533, 93d Cong., 2d Sess. VI (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

As applied by the Ninth Circuit, the "serious consideration" disclosure requirement will more likely confuse, rather than educate, employees whose benefits are being negotiated through the collective bargaining process, particularly where multiple alternative options are involved in either the preparation or negotiation phase of bargaining. As noted above, many options that are considered in preparing for bargaining never make it to the bargaining table and in negotiations proposed benefit enhancements (and cutbacks) may evolve from minute to minute. While ERISA benefits are being negotiated, no proposal is set in stone and some or all of the proposed terms may never appear in a final collective bargaining agreement. Accordingly, disclosure either before or during collective bargaining about the proposed enhanced ERISA benefits the employer is considering will not help employees make a more informed retirement choice because such benefit terms are always subject to modification or abrogation until bargaining is completed. If anything, the disclosure could mislead employees about their benefits because they would probably believe the information sent to them is significant and mistakenly believe the proposals disclosed will actually materialize.

3. Due to the Nature of Collective Bargaining, the "Serious Consideration" Disclosure Standard Cannot be Met in the Context of Collective Bargaining.

The standard for meeting "serious consideration," which requires that the proposal to change plan benefits be discussed "for purposes of implementation" by "senior management with the authority to implement the change," cannot properly be applied in the collective bargaining context because it ignores the fact that *no one* in management has the authority to implement a change in plan benefits without union approval.

Outside of collective bargaining, the circuits have struggled with the meaning of "senior management" under this standard. In *Fischer II*, the Third Circuit stated that consideration by senior management is "limited to those executives who possess the authority to implement the proposed change," but concluded the focus on authority should not limit "serious consideration" to deliberations by a quorum of the Board of Directors, which is typically the only corporate body in a literal sense that has the power to implement changes in benefit packages. *Fischer II*, 96 F.3d at 1540. Accordingly, it held that it is sufficient for the standard if the plan was considered by those members of senior management "with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefit operations." *Id.*

Relying on *Fischer II*, in *Bins II*, the Ninth Circuit extended the definition of "serious consideration" to include consideration by management of a subsidiary employer that had no authority to make changes to the

parent company's benefit plans. It held that if the employer's relationship to its parent resembled a corporation's relationship to its Board of Directors, "serious consideration" by the subsidiary's senior management would be sufficient to satisfy the serious consideration standard. *Bins II*, 220 F.3d at 1051.

Regardless of the merits of this debate, the standard is unworkable in the context of collective bargaining. The relationship between an employer and a union bears no resemblance to the relationship between a corporation and its Board of Directors or the relationship between an employer and its parent company. The union never merely approves the proposals made by the employer in collective bargaining. Indeed, in this case, the Union did not agree to two of Pacific's proposals for an enhanced retirement benefit. It was only through the process of collective bargaining, after proposals and counterproposals had been put on the table, that Pacific and the Union came to an agreement on an enhanced early retirement benefit plan, i.e., the ERB.

Accordingly, in the context of collective bargaining, the standard for "serious consideration" is unworkable.

II. THE WRIT SHOULD BE GRANTED BECAUSE THERE IS A SPLIT AMONG THE CIRCUITS ABOUT WHETHER MISREPRESENTATIONS ABOUT FUTURE ERISA PLAN CHANGES MADE PRIOR TO "SERIOUS CONSIDERATION" CAN BE MATERIAL TO CONSTITUTE A BREACH OF FIDUCIARY DUTY UNDER ERISA.

In this case, the Ninth Circuit held that an employer can breach its fiduciary duties under ERISA by actively misinforming plan beneficiaries about whether there is a possibility of improved retirement benefits "'whether or not

it is seriously considering future plan changes.'" *Wayne*, 238 F.3d at 1055 (App. A at 12a). To reach that holding, it relied on *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) and *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997).

The Ninth Circuit's reliance upon *Varity* is misplaced. In *Varity*, this Court considered a situation where the employer had made misrepresentations about the security of its employees' non-pension ERISA benefits to induce them to transfer to a new corporate entity into which several unprofitable divisions of its subsidiary were being combined. To induce its employees to transfer to the new company, the employer held a meeting where it told its employees that their benefits would remain secure when they transferred, notwithstanding that the new company was insolvent from the day it was created. As expected, the new company ended its second year in a receivership and the employees who had transferred lost their non-pension benefits. *Varity*, 516 U.S. at 492-94. Unlike this case, where the alleged misrepresentations concerned *potential future changes* to benefit plans, the misrepresentations in *Varity* were about the viability of *existing* benefit plans.

Relying on *Varity*, in *Ballone*, the Second Circuit held that "serious consideration" of a plan change is not a prerequisite to materiality for purposes of breaching fiduciary duties under ERISA; rather, it is one factor to consider. *Ballone*, 109 F.3d at 122-24 (citing *Varity*, 516 U.S. at 506-507).

Contrary to the Ninth Circuit's holding in this case and the Second Circuit's holding in *Ballone*, the majority of other circuits that recognize a duty to disclose future plan changes have taken an opposite view: that misrepresentations or omissions in response to plan participant inquiries about potential future early retirement benefit changes are not "material" and therefore cannot be the basis for a claim for breach of fiduciary duty under

ERISA unless the employer has given "serious consideration" to them and failed to inform the employees. *See, e.g., Vartanian II,* 131 F.3d 264 (1st Cir. 1997); *Hockett,* 109 F.3d 1515, 1522-23 (10th Cir. 1997); *Muse,* 103 F.3d 490, 493 (6th Cir. 1996); *Fischer II,* 96 F.3d 1533 (3d Cir. 1996); *Wilson,* 55 F.3d 399, 405 (8th Cir. 1995); *Vartanian I,* 14 F.3d 697, 702 (1st Cir. 1994); *Fischer I.,* 994 F.2d 130, 135 (3d Cir. 1993); *Kurz,* 994 F.2d 136, 139 (3d Cir. 1993).

In *Fischer II,* the Third Circuit explained the reason why statements about potential future early retirement benefit changes that are made prior to serious consideration are not "material" and therefore cannot be the basis for a claim for breach of fiduciary duty. It first noted that interactions between a company-as-fiduciary and its employees-beneficiaries regarding changes in benefits are governed by the following general rule: "'A plan administrator may not make affirmative *material* misrepresentations to plan participant about changes to an employee pension benefits plan. *Fischer II,* 96 F.3d at 1538. Relying on that rule, it held that "[s]erious consideration forms the crux of the inquiry" of whether a misrepresentation is "material", i.e., whether "'there is a substantial likelihood that [the misrepresentation] would mislead a reasonable employee in making an adequately informed decision about if and when to retire.'" Id. at 1538 (citing *Fischer I,* 994 F.2d at 135) (emphasis added).

Since the Third Circuit held that the overall materiality inquiry will include "an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made," it opined that "the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality." *Id.* (citing *Fischer I,* 994 F.2d at 135). Significantly, it stated that "the only factor" that controls the materiality test "is the

degree of seriousness with which the change was in fact being considered." *Id.* (quoting *Fischer I*, 994 F.2d at 135).

The Ninth Circuit failed to consider the importance of materiality. Under its ruling, a person "misinforms by saying that something is true when the person does not know whether it is true or not." *Wayne*, 238 F.3d at 1055 (App. A at 13a). Therefore, if an employer-fiduciary responds to an inquiry about enhanced future benefits with a statement that there are no plans to provide enhanced benefits *before* serious consideration has occurred, the employer-fiduciary can be held liable for breach of fiduciary duty. This ruling will interfere with an employer's day-to-day operations. Employers regularly review their benefit packages for purposes of cost monitoring and personnel management and often consider changes in benefit plans. To comply with the Ninth Circuit's ruling, an employer will be required to disclose each step in the process of developing strategies, gathering information, evaluating options, and making decisions. Such a disclosure requirement is a "practicable impossibility." *See Fischer II*, 96 F.3d at 1538.

Furthermore, as discussed above, several circuits have concluded that the fiduciary's disclosure duty "does not require the fiduciary to disclose its internal deliberations." *See, e.g., Drennan*, 977 F.2d at 251. By requiring an employer-fiduciary to disclose its potential ERISA benefit changes that it has not seriously considered, the Ninth Circuit is in essence requiring the employer to disclose its internal deliberations.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

[Filed February 8, 2001]

No. 97-56456.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; CAROL JANE TIDWELL,
Plaintiffs-Appellants,
v.
PACIFIC BELL, a corporation; PACIFIC TELESIS GROUP,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California. No. CV-96-001188-E(CGA) William B. Enright, District Judge

Before: D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

ORDER

This court's opinion, filed August 30, 1999 is hereby amended. The amended opinion is filed simultaneously with this order.

The panel has voted to deny the petition for rehearing filed September 13, 1999. Judges Fernandez and W. Fletcher have voted to deny the petition for rehearing en banc and Judge D.W. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPINION

WILLIAM A. FLETCHER, Circuit Judge delivered the opinion of the Court :

Plaintiffs are six former Pacific Bell employees who claim their employer induced them to retire under an early retirement incentive program by failing to disclose in response to questions that it was seriously considering offering a more favorable program, and, in addition, by actively misinforming them about the potential availability of such a program. Plaintiffs appeal from the district court's order granting summary judgment for defendants

Pacific Bell and Pacific Telesis Group (collectively "Pacific")[3] on their claim for equitable relief for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"). We have jurisdiction under 28 U.S.C. § 1291. We reverse and remand.

We held in *Bins v. Exxon Company*, U.S.A., 220 F.3d 1042 (9th Cir. 2000) (en banc), that when an employer-fiduciary begins to give "serious consideration" to an amendment of a retirement or severance program, it has a fiduciary obligation to communicate with plan participants and beneficiaries. It need not volunteer information, but when asked a question by a participant or beneficiary "the employer's fiduciary duty is to respond completely and truthfully about the present state of affairs--that is, whether serious consideration has begun." *Id.* at 1053. In that circumstance, the employer- fiduciary must "communicate the potential amendment accurately and straightforwardly." *Id.* at 1048.

In addition, we adopt in this case the rule followed by the Second Circuit that an employer-fiduciary "may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes." *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir.1997).

Applying the *Bins* rule requiring honest answers to questions once serious consideration has begun, and the *Ballone* rule against actively providing misinformation even prior to serious consideration, we hold that defendant Pacific was erroneously granted summary judgment.

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[3] This memorandum follows the practice of the parties and treats Pacific Bell and its parent holding company Pacific Telesis Group as one entity. Neither defendant disputes that it is a Plan fiduciary.

I.

Pacific was plaintiffs' employer and a fiduciary of the ERISA pension plan (the "Plan") in which plaintiffs participated. According to plaintiffs, Pacific misrepresented the Plan's financial stability, required plaintiffs to accept or reject an Early Retirement Incentive program (the "ERI II") during June 1995, and failed to disclose during that month that it was seriously considering a proposal to implement a more favorable Early Retirement Benefit program (the "ERB").

On approximately June 1, 1995, Pacific announced the ERI II, a so-called 4 + 4 early retirement incentive program. The ERI II provided an incentive to retire by adding four years to a person's age and four years to the actual number of years of service for purposes of determining eligibility, thereby enabling a younger person with less experience to retire early without a penalty in the amount of pension benefits. Pacific required plaintiffs to accept or reject the ERI II offering during a one-month window between June 1 and June 30, 1995. Employees who agreed to retire under the ERI II were required to retire on July 15, 1995. Plaintiffs each signed an Election and Agreement to Retire under the ERI II ("Agreement"). The Agreement did not permit plaintiffs to revoke their decisions to retire after June 30, 1995, the last day of the election period.

Pacific and plaintiffs' union, the Communications Workers of America (the "Union"), negotiate a new collective bargaining agreement every three years. Pacific and the Union had agreed to the terms of the ERI II as part of the August 1992 Collective Bargaining Agreement (the "1992 CBA"). Until August 5, 1995, the termination date of the 1992 CBA, Pacific was permitted to offer only early retirement incentive programs included in the 1992 CBA, such as the ERI II. Plaintiffs contend that, beginning in

approximately December 1994, and continuing through June 1995, Pacific misrepresented the Plan's financial status and the likelihood that Pacific would offer an enhanced benefit program under the upcoming August 1995 Collective Bargaining Agreement (the "1995 CBA").

During that time period, plaintiffs received mass voice-mail messages at work identifying senior managers who had been laid off, explaining that the marketing department needed people in other units to sell Pacific Bell services to neighbors and friends, and telling employees to save money on office supplies. Paulette Rennie, a first-level manager, told plaintiff Nancy Wayne that Pacific's financial prospects looked "gloomy." In May 1995, second-level managers Mike Lynch and Jim Ostrich held a floor meeting in plaintiffs' section and told them that the company was in bad financial condition and that they anticipated Pacific would lose 30 percent of its business customers once competition in the industry took effect. Lynch and Ostrich explained that for the first time in history shareholders might not receive dividends on their stock and that Pacific was going to have to cut 10,000 employees in five years.

At a June 1, 1995 meeting informing plaintiffs of the ERI II offer, management representatives stated in response to employee questions that "no additional monies would be available to make another early retirement offer." Plaintiff Mary Ann Acaldo recalls attending a meeting at which Pacific representatives, including Diane Raynor, the Pacific human resources manager responsible for disseminating information about the ERI II, answered employee questions about the ERI II. According to Acaldo, one of the people running that meeting stated that no retirement offers with enhanced benefits would be forthcoming.

During this period, plaintiff Acaldo was told by her supervisor that her job might be in danger. At some point after the ERI II offer, Acaldo stopped second-level manager

Mike Lynch in the hall. She told him she had heard rumors that a better early retirement offer might be made in the future, and she asked whether he thought that might be possible. Lynch responded, "Mary Ann, you're the smart one. All these other people are waiting for a bonus or for extra money. There is never going to be any money. This company can't afford to pay any money." Acaldo told all of the other plaintiffs what Lynch had said to her. Plaintiff Karen Kendrick asked her supervisor whether any better offers were going to be made and was told she "shouldn't count on it." Plaintiff Doris Ryan's manager told her she was eligible for the ERI II and suggested it would be a good idea to take the offer. Ms. Ryan concluded from this, and from her sense of Pacific's financial situation, that she had no choice but to take the offer because otherwise she would be "gone with nothing."

A June 6, 1995 in-house newsletter included a "State of the Business" column with responses by Pacific's executive vice president to employee questions about downsizing.[4] In that column, the executive vice president explained that it was "too early to tell" what cost-saving measures would be implemented in addition to workforce reduction and that "the next two or three years [would] be very challenging." The column also included the following question and answer:

> Q. We have heard rumors of another early out, comments?
>
> A. This is questionable due to two factors, the declining surplus in the pension fund and the dilemma of incenting (sic) good people to leave.

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[4] Pacific asserted at oral argument that the newsletter was distributed by an employee and not by Pacific. While the origin of the newsletter may be disputed, Pacific does not dispute that such statements were made to employees by Pacific management.

> Last years (sic) decision to utilize involuntary management force adjustment plan will stand.

The executive vice president's answer stated that the surplus in the pension fund was drying up and suggested that there would not be enough money in the fund in the future to offer early retirement incentives more favorable than the ERI II. In truth, however, Pacific's actuarial services group had concluded that the pension fund would be overfunded by 1.6 billion dollars by the year 2000 if Pacific did nothing to deplete the surplus. The answer also contained an implicit threat that employees who did not accept the current "early out" (the ERI II) ran the risk of being subjected to the "involuntary management force adjustment plan"—i.e., in plain English, ran the risk of being fired.

Sometime between late 1994 and early 1995, Pacific's labor relations committee developed an internal proposal to offer an enhanced early retirement program. That proposal was submitted to a high-level steering committee to prepare for the 1995 collective bargaining sessions with plaintiffs' Union. Pacific and the Union began formal collective bargaining for the 1995 CBA on June 13, 1995.

On June 15, the Union submitted Union Proposal No. 28, which noted that the Plan was "very healthy" and "greatly overfunded," and proposed a new 6 + 6 early retirement incentive with a cash incentive of one year's pay and additional financial benefits (the "6 + 6 proposal"). On June 16, Pacific countered with a Cash Balance Pension proposal. Unlike an early retirement program such as the ERI II or the Union's 6 + 6 proposal, the Cash Balance Pension proposal would have amended the Plan to allow Pacific to lay off employees rather than requiring it to keep earlier job security commitments. Under the Cash Balance Pension proposal, an employee not yet at retirement age would have been entitled to "cash out" the balance accrued

toward his or her pension rather than leaving Pacific with no pension benefits at all. The Union rejected this proposal.

On June 19, Pacific proposed a "Downsizing Program," which included an enhanced 4 + 4 Early Retirement Benefit program that included 20 percent supplemental payments through age 62 (the "proposed ERB" or "ERB proposal"). The proposed ERB also included an option to cash out the 20 percent supplemental payments, in effect providing an up-front cash incentive. The terms of the Union's June 15 6 + 6 proposal and of Pacific's June 19 ERB proposal were both more favorable to employees considering retirement than the terms of the existing ERI II.

Pacific and the Union ultimately agreed to amend the Plan by creating a new ERB consisting of a 4 + 4 early retirement program with a 30 percent supplement (an increase from the 20 percent supplement in Pacific's initial ERB proposal). Compared to the ERI II, the new ERB contained an approximate increase of 13-14 percent in pension benefits and 30 percent supplemental payments through age 62, with an option to cash out the supplemental payments. On August 8, 1995, Pacific and the Union formally agreed to the 1995 CBA, which included the new ERB.

In October, Pacific offered the new ERB to employees in plaintiffs' former work group.[5] If plaintiffs had retired under the new ERB offered to their work group in October rather than under the ERI II, they each would

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[5] It is not clear from the record whether Pacific and the Union later negotiated a modified version of the new ERB and offered that negotiated ERB to plaintiffs' work group. However, it is undisputed that both the new ERB and the "negotiated ERB" (if one existed) provided enhanced benefits as compared to the ERI II. For ease of reference, we will refer to the ERB offered to plaintiffs' work group simply as the new ERB.

have been entitled to additional pension benefits with cash values ranging from $26,962.74 to $99,241.38.

Plaintiffs sued Pacific in federal district court, seeking relief for alleged breach of fiduciary duty under ERISA, see 29 U.S.C. §§ 1104 and 1132(a)(2) & (3), benefits due under ERISA, see 29 U.S.C. § 1132(a)(1)(B), and declaratory relief.[6] [FN4] Pacific moved for summary judgment. The district court found that Pacific had "advertised that its financial health was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up." It also found that plaintiffs had asked their supervisors whether better early retirement incentives would be offered in the future, but that their supervisors had told them there would be no better offers. Nevertheless, the district court held Pacific had not actively misinformed the employees in order to induce them to retire earlier because the final outcome of negotiations between Pacific and the Union was uncertain until collective bargaining was completed.

The district court held that Pacific had a duty to disclose material information to plaintiffs once plans to implement improved benefits were under "serious consideration," but the court concluded that serious consideration could not take place until collective bargaining resulted in a binding CBA. In addition, the district court held that Pacific was not permitted to communicate with individual employees during collective bargaining about potential terms of a future early retirement program because such communications would have interfered with the Union's role as the employees' exclusive bargaining agent.

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[6] Plaintiffs originally asserted several state law claims in addition to their ERISA claims. Plaintiffs have dismissed those state law claims pursuant to stipulation.

The district court granted summary judgment for Pacific. We review de novo. *See Williams v. Caterpillar, Inc.*, 944 F.2d 658, 661 (9th Cir.1991).

II.

Pacific does not dispute that as an employer-fiduciary it has a fiduciary duty under ERISA. As soon as an employer-fiduciary gives serious consideration to a proposal to change retirement benefits, it has a duty to disclose, in response to inquiries, information about the proposal to plan participants and beneficiaries. *See Bins*, 220 F.3d at 1048-49. Further, even before serious consideration begins, an employer-fiduciary has a duty not to actively misinform its employees in an attempt to induce them to retire earlier than they otherwise would. *See Ballone*, 109 F.3d at 124.

A.

To determine when an employer has begun serious consideration of a change in ERISA benefits, we use the framework established by the Third Circuit in *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir.1996) ("*Fischer II* "), as adopted and explained in our en banc decision in *Bins*. Once serious consideration has begun, an employer-fiduciary must respond to questions "accurately and straightforwardly." 220 F.3d at 1048. It is unclear on this record precisely when serious consideration began, but it is at least clear that it had already occurred when Pacific presented its proposed ERB to the Union during collective bargaining on June 19, 1995. At that point, the proposal had been prepared by Pacific's labor relations team; had been reviewed by a high-level steering committee; and was offered to the Union by a Pacific representative with authority to bind Pacific to its terms. Pacific nonetheless contends that the proposal had not been seriously

considered by June 19 because it had not yet been accepted by the Union. We disagree.

Addressing a similar argument in *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir.1992), the Sixth Circuit rejected an argument by General Motors ("GM") that because GM could not change separation benefits without the union's approval it had no fiduciary duty to disclose information about the proposed change. *See id.* at 252. The Sixth Circuit concluded that information about the proposed change was material to the interests of employees who were deciding whether to accept the terms of another GM separation plan for which they were already eligible: "[I]t was GM's serious consideration of the plan, rather than the union's approval of the plan, that triggered its fiduciary duties." *Id.* Consequently, GM had a fiduciary duty to provide participants accurate and straightforward responses to questions about the proposed change despite the fact that collective bargaining had not yet been concluded. *See id.*

We adopt the reasoning of the Sixth Circuit and hold that whether the CBA had ultimately included Pacific's ERB proposal is not determinative of the question whether Pacific had given it "serious consideration" under *Bins*. The Union's approval of the proposal, and thus a high standard of certainty that it would be implemented, is not required. A guarantee of improved retirement or severance benefits is, of course, material to an employee contemplating retirement; but the reasonable probability, or even the realistic possibility, of improved benefits is also material to such an employee.

An employer is free to engage in business activities without violating its fiduciary duties under ERISA, and to assert its business interests in collective bargaining. But the fact that an employer-fiduciary has no obligation to bargain in its employees' interests, *see Lea v. Republic Airlines, Inc.*,

903 F.2d 624, 631 (9th Cir.1990), does not mean that it is free during a period of collective bargaining, or in anticipation of such bargaining, to withhold information from plan participants in violation of its fiduciary duty under ERISA. More specifically, we do not believe that ERISA's disclosure requirement necessarily conflicts with an employer's obligation not to bargain with individual employees. *See* generally 29 U.S.C. § 159(a) (providing that designated bargaining representatives shall be exclusive employee representatives for purposes of collective bargaining).

Pacific relies on *National Labor Relations Board v. Baltimore News Am. Div.*, 590 F.2d 554 (4th Cir.1979), in which the Fourth Circuit held that an employer is not entitled to offer enhanced retirement and pension benefits to individual employees unilaterally without the approval of their bargaining agent. *See id.* at 556. In *Baltimore News*, however, the employer offered the enhanced early retirement program directly to individual employees after reaching a bargaining impasse with the union over the proposed change. *See id.* at 555. An employer attempting to undermine a union's power to bargain on behalf of its members is a far cry from communicating as a fiduciary about serious consideration of a proposal to change employee benefits under an ERISA plan. *See Adamczyk v. Lever Bros. Co.*, 33 F.Supp.2d 679, 687 (N.D. Ill. 1998) (rejecting application of *Baltimore News* where plaintiffs represented by union claimed employer had failed to inform them that it was seriously considering enhanced benefits package).

B.

Pacific's fiduciary duty is not confined to providing truthful answers to questions once serious consideration has begun. As a fiduciary, it also has a duty not to actively misinform plan participants and beneficiaries, whether or not there has been serious consideration. "To participate

knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries.' As other courts have held, '[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'" *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (citation omitted).

The fiduciary duty not to deceive plan participants and beneficiaries exists at all times, not merely once serious consideration of offering such benefits has begun. We agree with the Second Circuit that, in the context of the possibility of improved retirement benefits, an employer may not "actively misinform" plan beneficiaries about such a possibility in order to induce them to retire early "whether or not it is seriously considering future plan changes." *Ballone*, 109 F.3d at 124 (emphasis added). *See also In re Unisys Corp. Retiree Med. Benefit* "ERISA" Litig., 57 F.3d 1255, 1266- 67 (3d Cir. 1995) ("The district court's findings that the company actively misinformed its employees by affirmatively representing to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true and that employees were making important retirement decisions relying upon this information, clearly support a claim for breach of fiduciary duty under ERISA.").

In this case, the district court held that Pacific did not actively misinform its employees because "the final outcome of the [collective] bargaining could not be predicted." The district court's holding is based on a misunderstanding of what it means to actively misinform. A person actively misinforms by saying that something is true when it is not true. But the person also misinforms by saying that something is true when the person does not know whether it is true or not. Under this standard, a reasonable factfinder could conclude that Pacific actively

misinformed its employees. There is evidence in the record that Pacific affirmatively represented to its employees that no offer of an improved benefits package would be offered when, in fact, Pacific knew that it would propose such a package to the Union and that there was at least a reasonable probability that some version of the package would ultimately be incorporated into the collective bargaining agreement.

To determine when the *Bins* duty to disclose arose, the district court must determine, irrespective of the pendency of collective bargaining, the date on which Pacific began "serious consideration" of improved retirement benefits. After that date, Pacific had a duty to respond "accurately and straightforwardly" to inquiries from its employees. *Bins*, 220 F.3d at 1053. The district must also determine whether Pacific actively misinformed its employees about the availability of improved retirement benefits at any time, even before "serious consideration." *See Ballone*, 109 F.3d at 124. On the current record, neither of these determinations can be made in favor of Pacific on a motion for summary judgment.

We therefore REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

[Filed August 14, 1997]

No. 96-1188-E (CGA)

NANCY WAYNE, et al.,)
)
Plaintiffs,)
)
v.)
)
PACIFIC Bell, et al.,)
)
Defendants.)

MEMORANDUM DECISION & ORDER

BACKGROUND

This is an ERISA action by five plaintiffs against their former employer, Pacific Bell, and its parent corporation, Pacific Telesis Group. The terms of plaintiffs' employee benefits were governed by a collective bargaining agreement between their Union (Communications Workers of America) and Pacific Bell. The existing three-year contract covered the period from August 9, 1992 to August 5, 1995. That contract provided for an early retirement plan called ERI Phase II. In May 1995, Pacific Bell offered

nineteen eligible employees the opportunity to elect early retirement under ERI Phase II. The offer required the employees to make the election between June 1 and June 30, 1995. The "4 + 4" plan added four years towards calculating their service and four years toward their age, which increased the total payout to the employee.

In trying to reach a decision, the plaintiffs asked their immediate supervisors if there might be other financial incentives offered in the future, and were told that there would be no better offers and there would definitely be no offers with a cash bonus. Pacific Bell advertised that its financial health was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up. The five plaintiffs elected to retire within that June window of time, and retired as of July 15, 1995, as required. They were paid their early retirement benefits in accord with the ERI Phase II plan.

Simultaneously, the Union and Pacific Bell began their negotiations on the new three-year collective bargaining agreement on June 13, 1995. On June 15 and 19, 1995, the Union and Pacific Bell traded proposals for an early retirement incentive program. Both the offer and the counteroffer included a cash incentive. On August 8, 1995, the Union and Pacific Bell closed their negotiations. The new contract provided a better early retirement plan called ERB, which Pacific Bell offered to its remaining employees in October 1995. The new incentive program increased the pension benefits by 14% and included a 30% cash bonus. Thus, for example, under the new plan, plaintiff Nancy Wayne would have been entitled to an additional $99,241 in benefits.

The first amended complaint alleges a breach of fiduciary duty claim under ERISA, a claim for benefits under ERISA, declaratory relief, and attorney's fees under ERISA. Plaintiffs' theory is that the employer misled the

employees, thereby breaching its fiduciary duty, by telling them in June that no better offer would be made, when in fact the employer was then discussing a better retirement plan with the Union. Plaintiffs' want to participate in the better ERB plan.

Defendants move for summary judgment on all counts.

DISCUSSION

A party is entitled to summary judgment if the pleadings and other documents show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The opposing party must set forth specific facts showing there is a genuine issue for trial. A*nderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

ERISA imposes a broad fiduciary duty on the employer with regard to the employee pension plan. 29 U.S.C. § 1104(a) (2), (3); *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996). That duty requires the employer to disclose material information to the beneficiaries. *Mullins v. Pfizer*, 23 F.3d 663, 667 (2d Cir. 1994); *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990). For example, in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), the Second Circuit concluded that an employer could not actively misinform the plan beneficiaries about the availability of future retirement benefit in order to induce the employees to retire earlier. The duty to disclose arises when the plans to implement improved benefits are under "serious consideration" by the company. *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533, 1537-58 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Mullins*, 23 F.3d at 669; *Drennan v. General Motors*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993).

The court is persuaded by Pacific Bell's argument that the facts show that as of June 1995, when the employees elected to take the early retirement plan open to them, Pacific Bell did not know what the terms of any future early retirement offer might include. At that time, the Union and the company were merely negotiating the next contract, so the final outcome was uncertain. One example of the uncertainty of the final contract is that the Union faced a difficult decision in relation to the competing interest of its own membership. The Union had to resolve the conflicting interests of the senior employees' interest in an enhanced exit incentive and the mid-level employees' interest in cash. This demonstrates that the company could not predict what the Union's ultimate position would be, let alone foretell the final terms of the complete agreement. Pacific Bell did not know the specific underlying terms of the next early retirement package until the negotiations closed on August 8, 1995 -- which was after plaintiffs had retired. Pacific Bell, as employer, had no right to unilaterally change a term of the employment until it completed the bargaining process with the Union. The company could not predict how the negotiations would resolve. Consequently, the better early retirement package was not being "seriously considered" at the time plaintiffs made their decision to retire.

Moreover, even assuming a duty to disclose, it is limited to situations that will not "interfere with the substantive aspects of the bargaining processes." *Drennan*, 977 F.2d at 251. Principals of collective bargaining law support Pacific Bell's position that the employer could not communicate with the individual employees about potential terms because that would have interfered with the Union's role as the employees' exclusive bargaining agent. *See Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 627 (9th Cir. 1990); *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404, 1405 (9th Cir. 1989).

Plaintiffs attempt to distinguish their claim because once they asked their supervisors about the possibility of a better package, the company, as the ERISA fiduciary, could not mislead them. The court rejects this argument as the facts show that the employers told the plaintiffs that there was no guarantee of a better offer; and at that time, the next contract was still under negotiation, so there was no certainty. *See Hockett v. Sun Co.*, 109 F.3d 1515, 1523 (10th Cir. 1997). This is not a case in which the company affirmatively misled the employees in order to induce them to retire earlier. *Cf. Varity*, 116 S. Ct. 1065; *Drennan*, 977 F.2d at 249. By definition, the process of negotiation entails compromise and change; thus, the final outcome of the bargaining could not be predicted.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby grants defendants' motion for summary judgment [# 37]. The court vacates the September 22, 1997 pretrial conference.

DATED: August 13, 1997.

WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

[Filed]

No. 97-56546

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; CAROL JANE TIDWELL,
Plaintiffs-Appellants,
v.
PACIFIC BELL, a corporation; PACIFIC TELESIS GROUP,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California No. CV-96- 001188-E(CGA).
William B. Enright, District Judge

Before: D. W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

W. FLETCHER, Circuit Judge delivered the opinion of the Court, in which Nelson, D. W., joined. Fernandez delivered a separate opinion concurring in part and dissenting in part.

OPINION

Plaintiffs are six former Pacific Bell employees who claim their employer induced them to retire under an early retirement incentive program by failing to disclose that it was seriously considering offering a more favorable program. Plaintiffs appeal from the district court's order granting summary judgment for defendants Pacific Bell and Pacific Telesis Group (collectively "Pacific")[7] on their claim for equitable relief for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"). We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

We recently held in *Bins v. Exxon Company*, U.S.A., 189 F.3d 929 (9th Cir.1999), that once an employer-fiduciary gives serious consideration to a proposal to change ERISA benefits, it has an affirmative duty to disclose information about the proposal to all plan participants and beneficiaries to whom the employer knows, or has reason to know, the information is material. Applying that rule here, we hold that Pacific had an affirmative duty to disclose such information, at the latest, when it offered plaintiffs' union

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[7] This memorandum follows the practice of the parties and treats Pacific Bell and its parent holding company Pacific Telesis Group as one entity. Neither defendant disputes that it is a Plan fiduciary.

an enhanced early retirement program during collective bargaining.

I.

Pacific was plaintiffs' employer and a fiduciary of the ERISA pension plan (the "Plan") in which plaintiffs participated. According to plaintiffs, Pacific misrepresented the Plan's financial stability, required plaintiffs to accept or reject an Early Retirement Incentive program (the "ERI II") during June, 1995, and failed to disclose during that month that it was seriously considering a proposal to implement a more favorable Early Retirement Benefit program (the "ERB").

On approximately June 1, 1995, Pacific announced the ERI II, a 4 + 4 early retirement incentive program. The ERI II provided an incentive to retire by adding four years to a person's age and four years to the actual number of years of service for purposes of determining eligibility, thereby enabling a younger person with less experience to retire early without a penalty in the amount of pension benefits. Pacific required plaintiffs to accept or reject the ERI II offering during a one-month window between June 1 and June 30, 1995. Employees who agreed to retire under the ERI II were required to retire on July 15, 1995. Plaintiffs each signed an Election and Agreement to Retire under the ERI II ("Agreement"). The Agreement did not permit plaintiffs to revoke their decisions to retire after June 30, 1995, the last day of the election period.

Pacific and plaintiffs' union, the Communications Workers of America (the "Union"), negotiated a new collective bargaining agreement every three years. Pacific and the Union had agreed to the terms of the ERI II as part of the August 1992 Collective Bargaining Agreement (the "1992 CBA"). Until August 5, 1995, the termination date of the 1992 CBA, Pacific was permitted to offer only early

retirement incentive programs included in the 1992 CBA, such as the ERI II. Plaintiffs contend that, beginning in approximately December, 1994, and continuing through June, 1995, Pacific misrepresented the Plan's financial status and the likelihood that Pacific would offer an enhanced benefit program under the upcoming August 1995 Collective Bargaining Agreement (the "1995 CBA").[8]

During that time period, plaintiffs received mass voice-mail messages at work identifying senior managers who had been laid off, explaining that the marketing department needed people in other units to sell Pacific Bell services to neighbors and friends, and telling employees to save money on office supplies. Paulette Rennie, a first-level manager, told plaintiff Nancy Wayne that Pacific's financial prospects looked "gloomy." In May, 1995, second-level managers Mike Lynch and Jim Ostrich held a floor meeting in plaintiffs' section and told them that the company was in a bad state financially and that they anticipated Pacific would lose 30 percent of its business customers once competition in the industry took effect. Lynch and Ostrich explained that for the first time in history shareholders might not receive dividends on their stock and that Pacific was going to have to cut 10,000 employees in five years.

At a June 1, 1995, meeting informing plaintiffs of the ERI II offer, management representatives stated in response to employee questions that "no additional monies would be available to make another early retirement offer." Plaintiff Mary Ann Acaldo recalls attending a meeting at which Pacific representatives, including Diane Raynor, the Pacific

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[8] In *Bins*, we held that an employer-fiduciary has an affirmative duty of disclosure once it seriously considers implementing a change in benefits. *See Bins*, 189 F.3d at 929. Once that affirmative duty is triggered, the court need not consider whether the employer also made misrepresentations, for the failure to disclose material information to plan participants and beneficiaries is itself a breach of the employer's fiduciary duty under ERISA.

human resources manager responsible for disseminating information about the ERI II, answered employee questions about the ERI II. According to Acaldo, one of the people running that meeting stated that no retirement offers with enhanced benefits would be forthcoming.

During this period, plaintiff Acaldo was told by her supervisor that her job might be in danger. At some point after the ERI II offer, Acaldo stopped second-level manager Mike Lynch in the hall. She told him she had heard rumors that a better early retirement offer might be made in the future, and she asked whether he thought that might be possible. Lynch responded "Mary Ann, you're the smart one. All these other people are waiting for a bonus or for extra money. There is never going to be any money. This company can't afford to pay any money." Acaldo told all of the other plaintiffs what Lynch had said to her. Plaintiff Karen Kendrick asked her supervisor whether any better offers were going to be made and was told she "shouldn't count on it." Plaintiff Doris Ryan's manager told her she was eligible for the ERI II and suggested it would be a good idea to take the offer. Ryan concluded from this, and from her sense of Pacific's financial situation, that she had no choice but to take the offer because otherwise she would be "gone with nothing."

A June 6, 1995, in-house newsletter included a "State of the Business" column with responses by Pacific's executive vice president to employee questions about downsizing.[9] In that column, the executive vice president explained that it was "too early to tell" what cost-saving measures would be implemented in addition to workforce reduction and that "the next two or three years [would] be

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[9] Pacific asserted at oral argument that the newsletter was distributed by an employee and not by Pacific. While the origin of the newsletter may be disputed, Pacific does not dispute that such statements were made to employees by Pacific management.

very challenging." The column also included the following question and answer:

> Q. We have heard rumors of another early out, comments?
>
> A. This is questionable due to two factors, the declining surplus in the pension fund and the dilemma of incenting [sic] good people to leave. Last years [sic] decision to utilize involuntary management force adjustment plan will stand.

The executive vice president's answer thus contained an implicit threat that employees who did not accept the current "early out" ran the risk of being subjected to the "involuntary management force adjustment plan"–i.e., in plain English, ran the risk of being fired. Plaintiffs also understood the newsletter to mean that the surplus in the pension fund was drying up and that there would not be enough money in the fund in the future to offer early retirement incentives more favorable than the ERI II. In truth, however, Pacific's actuarial services group had concluded that the pension fund would be overfunded by 1.6 billion dollars by the year 2000 if Pacific did nothing to deplete the surplus.

Between late 1994 and early 1995, Pacific's labor relations committee had already developed an internal proposal to offer an enhanced early retirement program. That proposal was submitted to a high-level steering committee to prepare for the 1995 collective bargaining sessions with plaintiffs' Union. Pacific and the Union began formal collective bargaining for the 1995 CBA on June 13, 1995.

On June 15, the Union submitted Union Proposal No. 28, which noted that the Plan was "very healthy" and "greatly overfunded," and proposed a new 6 + 6 early

retirement incentive with a cash incentive of one year's pay and additional financial benefits (the "6 + 6 proposal"). On June 16, Pacific introduced a Cash Balance Pension proposal. Unlike an early retirement program such as the ERI II or the Union's 6 + 6 proposal, the Cash Balance Pension proposal would have amended the Plan to allow Pacific to lay off employees rather than requiring it to keep earlier job security commitments. Under the Cash Balance Pension proposal, an employee not yet at retirement age would have been entitled to "cash out" the balance accrued toward his or her pension rather than leaving Pacific with no pension benefits at all. The Union rejected this proposal.

On June 19, Pacific proposed a "Downsizing Program," which included an enhanced 4 + 4 early retirement benefit program that included 20 percent supplemental payments through age 62 (the "proposed ERB" or "ERB proposal").

The proposed ERB also included an option to cash out the 20 percent supplemental payments, in effect providing an up-front cash incentive. The terms of the Union's 6 + 6 proposal and of Pacific's ERB proposal were both more favorable to employees considering retirement than the terms of the existing ERI II.

Pacific and the Union ultimately agreed to amend the Plan by creating a new ERB consisting of a 4 + 4 early retirement program with a 30 percent supplement (an increase from the 20 percent supplement in Pacific's initial ERB proposal). Compared to the ERI II, the new ERB contained an approximate increase of 13 to 14 percent in pension benefits and 30 percent supplemental payments through age 62, with an option to cash out the supplemental payments. On August 8, 1995, Pacific and the Union formally agreed to the 1995 CBA, which included the new ERB.

In October, Pacific offered the new ERB to employees in plaintiffs' former work group.[10] Had plaintiffs retired under the new ERB offered to their work group in October instead of under the ERI II, they would each have been entitled to additional pension benefits with cash values ranging from $26,962.74 to $99,241.38.

Plaintiffs sued Pacific in federal court, seeking relief for alleged breach of fiduciary duty under ERISA, *see* 29 U.S.C. §§ 1104 and 1132(a)(2) & (3), benefits due under ERISA, *see* 29 U.S.C. § 1132(a)(1)(B), and declaratory relief.[11] Pacific moved for summary judgment. The district court found that Pacific had "advertised that its financial health was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up." The district court also concluded that plaintiffs had asked their supervisors whether better early retirement incentives would be offered in the future, but that their supervisors had told them there would be no better offers. Nevertheless, the district court held Pacific had not affirmatively misled the employees in order to induce them to retire earlier, and that the undisputed facts established that plaintiffs were told only that there was no guarantee of a better offer.

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[10] It is not clear from the record before us whether Pacific and the Union later negotiated a modified version of the new ERB and offered that negotiated ERB to plaintiffs' work group. In any event, it is undisputed that both the new ERB and the "negotiated ERB" (if one existed) provided enhanced benefits as compared to the ERI II. For ease of reference, we will refer to the ERB offered to plaintiffs' work group simply as the new ERB.

[11] Plaintiffs originally asserted several state law claims in addition to their ERISA claims. Plaintiffs have dismissed those state law claims pursuant to stipulation.

The district court held that Pacific had a duty to disclose material information to plaintiffs once plans to implement improved benefits were under "serious consideration," but the court concluded that Pacific's serious consideration could not take place until collective bargaining resulted in a binding agreement with the Union. In addition, the district court held that Pacific was not permitted to communicate with individual employees about potential terms of a future early retirement program because such communications would have interfered with the Union's role as the employees' exclusive bargaining agent. Accordingly, the district court granted summary judgment for Pacific. We review de novo a decision granting summary judgment. *See Williams v. Caterpillar, Inc.*, 944 F.2d 658, 661 (9th Cir.1991).

II.

Pacific does not dispute that it is an ERISA fiduciary under the Plan. As noted above, we recently held that when an employer-fiduciary gives serious consideration to a proposal to change retirement benefits, it has an affirmative duty to disclose information about the proposal to plan participants and beneficiaries to whom the employer knows, or has reason to know, the information is material. *See Bins*, 189 F.3d 929. Pacific knew that plaintiffs had agreed to accept the ERI II and that the last day for plaintiffs to revoke their acceptance was June 30, 1995. It also knew that the likely future of plan benefits was material to each plaintiff's decision whether to retire under the ERI II. Thus, if Pacific seriously considered a proposal to change benefits prior to June 30, it had an affirmative duty to provide plaintiffs with straightforward and accurate information about that proposal. *See id.*

To determine when an employer has seriously considered changing ERISA benefits, we use the framework established by the Third Circuit in *Fischer v. Philadelphia*

Electric Co., 96 F.3d 1533 (3d Cir. 1996) ("*Fischer II*"), as adopted and explained in our decision in *Bins*. *See Bins*, 189 F.3d at 933. Under that test, serious consideration takes place when "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." *Bins*, 189 F.3d at 935. Under *Fischer II* and *Bins*, the three parts of the test are not isolated criteria but related elements that must be analyzed together in an "inherently fact-specific" review. *Bins*, 189 F.3d at 935.

We hold that serious consideration took place, at the latest, on June 19, 1995, when Pacific presented its proposed ERB to the Union in the collective bargaining session. At that point, the proposal had been prepared by Pacific's labor relations team, had been reviewed by a high-level steering committee, and had been offered to the Union by a Pacific representative with authority to bind Pacific to its terms. Pacific contends the proposed ERB was not being discussed "for purposes of implementation" because it had not yet been accepted by the Union. We disagree and hold that offering a specific proposal in collective bargaining constitutes "discussion for purposes of implementation" of such a proposal under *Fischer II* and *Bins*.

The district court thus erred in accepting Pacific's argument that it did not seriously consider a change in benefits until it signed a new collective bargaining agreement with the Union. Addressing a similar argument in *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), the Sixth Circuit held that during a period of collective bargaining General Motors ("GM") had seriously considered changing eligibility for a particular separation benefits plan. *See id.* at 251-52. The court rejected GM's argument that because it could not change separation benefits without the union's approval it had no fiduciary duty to disclose information about the proposed change. *See id.* at 252. The Sixth Circuit concluded that information

about the proposed change was material to the interests of employees who were deciding whether to accept the terms of another GM separation plan for which they were already eligible. *See id.* As the *Drennan* court put it, "[I]t was GM's serious consideration of the plan, rather than the union's approval of the plan, that triggered its fiduciary duties." *Id.* Consequently, GM had a fiduciary duty to provide participants straightforward and accurate information about the proposed change despite the fact that collective bargaining had not yet been concluded. *See id.*[12]

The *Drennan* rule is directly applicable here. Pacific presented the ERB proposal to the Union on June 19, 1995, eleven days before the last day on which plaintiffs could decline the ERI II offering. Whether the Union accepted the ERB proposal was immaterial to the question of whether Pacific was giving it "serious consideration" under *Fischer II* and *Bins*. Once it made that proposal, at the latest, Pacific was obligated in its role as an ERISA fiduciary to provide plan participants with information about the possibility of favorable changes in the Plan. Just as an employer is free to engage in business activities without violating its fiduciary duties under ERISA, an employer is free to assert its business interests in collective bargaining. But the fact that an employer-fiduciary has no obligation to bargain in its employees' interests, *see Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990), does not mean that it is free during a period of collective bargaining to withhold information from plan participants in violation of its fiduciary duty under ERISA.

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[12] In *Drennan*, the court focused on the fact that GM had made material misrepresentations in response to employee inquiry about a possible change in benefits. 977 F.2d at 250-51. In light of our decision in *Bins* that an employer-fiduciary has an affirmative duty to disclose information to plan participants and beneficiaries to whom it knows the information is material, we need not consider plaintiffs' contention that Pacific Bell misrepresented the likely future of plan benefits in response to employee inquiry.

We do not believe that ERISA's disclosure requirement conflicts with an employer's obligation not to bargain with individual employees. *See* generally 29 U.S.C. § 159(a) (providing that designated bargaining representatives shall be exclusive employee representatives for purposes of collective bargaining). Pacific relies on *National Labor Relations Board v. Baltimore News American Division*, 590 F.2d 554 (4th Cir. 1979), in which the Fourth Circuit held that an employer is not entitled to offer enhanced retirement and pension benefits to individual employees unilaterally without the approval of their bargaining agent. *See id.* at 556. In *Baltimore News*, however, the employer offered the enhanced early retirement program directly to individual employees after reaching a bargaining impasse with the union over the proposed change. *See id.* at 555. Attempting as an employer to undermine a union's power to bargain on behalf of its members is a far cry from communicating as a fiduciary about serious consideration of a proposal to change employee benefits under an ERISA plan. *See Adamczyk v. Lever Bros. Co.*, 33 F. Supp. 2d 679, 687 (N.D. Ill. 1998) (rejecting application of Baltimore News where plaintiffs represented by union claimed employer had failed to inform them that it was seriously considering enhanced benefits package).

We believe that the affirmative duty to communicate articulated in *Bins* will not substantially interfere with the collective bargaining process. As we stated in *Bins*, "[t]he employer-fiduciary need only (1) inform those employees to whom the information may be useful that senior management is seriously considering changing benefits, and (2) generally describe the proposed changes and explain what categories of plan participants and beneficiaries might be affected." *Bins*, 189 F.3d at 939. This approach comports with the Third Circuit's statement in *Fischer II* that an ERISA fiduciary's duty "to answer

participants' questions forthrightly . . . does not require the fiduciary to . . . interfere with the substantive aspects of collective bargaining." 96 F.3d at 1539. Here, for example, both the employer and the union had proposed retirement programs that were more favorable to employees than the existing program, and disclosing the likelihood of improved retirement benefits to potentially affected employees would not have interfered with negotiations and would have helped potentially affected employees make informed decisions.

Providing employees with information relevant to their decisions about pension benefits does not interfere with bargaining unless the employer attempts to use those communications to undermine a union's position in bargaining. Collective bargaining often goes on for a sustained period before an agreement is reached, and an employer's duties as an ERISA fiduciary are not suspended during that period. Indeed, a contrary rule would produce perverse incentives, for if an employer's fiduciary duties were suspended during collective bargaining, the employer might be tempted to extend the bargaining period solely in order to avoid its fiduciary obligations.

Once Pacific seriously considered the ERB proposal, information about that proposal was material to each plaintiff's decision whether to accept the ERI II. Pacific knew plaintiffs were planning to retire, and it therefore had an affirmative duty to provide them with straightforward and accurate information about the existence and nature of the ERB proposal. *See Bins*, 189 F.3d at 929. In choosing not to provide that information, Pacific violated its fiduciary duty to plaintiffs under ERISA.

We therefore REVERSE and REMAND for further proceedings consistent with this opinion.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in the majority opinion's reversal of the summary judgment in this case. However, I dissent from that opinion to the extent that it relies upon the flawed decision in *Bins v. Exxon Co.*, 189 F.3d 929 (9th Cir.1999). The reasons for my disagreement are set forth in my dissenting opinion in that case. *See Bins*, 189 F.3d at 941-43 (Fernandez, J. dissenting).

That is to say, as I see it there is evidence that questions about possible amendments were not properly answered, even after those amendments were under serious consideration by the company. *See Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539-40 (3rd Cir. 1996). Moreover, there is evidence of actual mendacity, and that itself precludes summary judgment. *See Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124-26 (2nd Cir. 1997); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251-52 (6th Cir. 1992).

Therefore, I do concur in the remand, but respectfully dissent from the direction that the district court apply the *Bins* theory in deciding this case on remand.

APPENDIX D

PERTINENT STATUTORY PROVISIONS

29 U.S.C. § 151 provides:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by

removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 157 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1) and (a)(5) provide:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159(a) provides:

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That

the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 1104(a)(1) provides:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

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No. 00-1680

In The
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY, a California corporation, and PACIFIC TELESIS GROUP, a Nevada corporation,

Petitioners,

vs.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; and CAROL JANE TIDWELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Respondents fail to refute nearly all of the arguments made by petitioners to show the serious consideration disclosure requirement interferes with collective bargaining, *i.e.*, it interferes with an employer's right to bargain freely and deprives employers of concessions they are entitled to reserve for the bargaining table by requiring disclosure of employers' bargaining strategy before bargaining begins; it interferes with and undermines the union's role by causing employees to believe there is no need for a collective bargaining agent; it stifles employers' preparations for bargaining and consideration of alternatives for improved benefits; and it can confuse and mislead employees as well as hurt them by discouraging employer proposals to improve benefits. They also fail to refute that applying the requirement to union members does not further any ERISA policy because the employees are imputed to have knowledge of the proposed benefits changes by virtue of their agency relationship with the union. Instead, respondents simply rely on the Ninth Circuit's bald assertion that the requirement does not interfere with collective bargaining and ignore the many Circuits who have warned it can. Respondents also fail to address petitioners' argument that the disclosure standard cannot be met because an employer may not implement a change in plan benefits without union approval.

Respondents wrongly argue there is no Circuit split concerning the Ninth Circuit's holding that a misrepresentation about a future enhanced ERISA benefit made prior to "serious consideration" can establish a breach of fiduciary duty because unlike here, there were no "misrepresentations" in the cases upon which petitioners rely to show the conflict. There were misrepresentations in those cases similar to those alleged here, and the other Circuits

found they could not establish a breach of fiduciary duty because they were made prior to serious consideration. The conflict is ripe because a reversal will determine what alleged misrepresentations are at issue. A reversal will also resolve the entire case if all of the alleged misrepresentations occurred prior to serious consideration. In addition, the Ninth Circuit's ruling has created law for use in future cases that is contrary to the law of most Circuits.

For the reasons stated, the question of whether the serious consideration disclosure requirement should be applied in the collective bargaining context is a question of broad national importance that this Court should address.

II. RESPONDENTS DO NOT REBUT PETITIONERS' EXAMPLES OF HOW THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT INTERFERES WITH COLLECTIVE BARGAINING AND THEIR CLAIM THAT THERE IS NO INTERFERENCE IS BASED ON DEMONSTRABLY INCORRECT ASSERTIONS.

A. Respondents are Incorrect in Asserting that Other Courts have Applied the Disclosure Requirement in the Collective Bargaining Context.

Contrary to respondents' contention, no other court has applied the disclosure requirement in the context of collective bargaining. *See* Resp. Opp. at 10-12. *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (*"Bins II"*) and *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (*"Fischer II"*) are inapposite because neither involved union employees. Although *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992) and *Adamczyk v. Lever Bros. Co.*, 33 F. Supp 2d 679 (N.D. Ill. 1998) involved union employees, they are distinguishable because neither involved collective bargaining. In *Drennan*,

the ERISA plan about which the employees had inquired was already in effect and the employer could, with union assent, elect to offer it to those employees who met certain requirements. *Drennan*, 977 F.2d at 248-52. Thus, the employer was not in the position of having to bargain with the union about whether the plan inquired about should be adopted or about what the terms of the plan should be. In *Adamczyk*, the court concluded the serious consideration standard did not conflict with NLRA prohibitions because the misrepresentations had occurred *after* an initial agreement had been reached with the union. *Adamczyk*, 33 F. Supp. 2d at 687.

B. Respondents are Incorrect in Asserting that the Ninth Circuit's Opinion does not Require Substantial Disclosure and that the Impact of the Ninth Circuit's Opinion on Bargaining is Speculative.

Respondents incorrectly assert the Ninth Circuit's opinion does not require disclosure of the details of employer proposals under consideration and that Pacific therefore could have informed them only that an enhanced early retirement benefit was under consideration. Resp. Opp. at 13-14. Contrary to their contention, the Ninth Circuit held an employer must "'respond completely and truthfully about the present state of affairs" and must communicate "'the potential amendment accurately and straightforwardly.'" *See* App. A at 3a, 14a (*citing Bins II*, 220 F.3d at 1048, 1053).

Therefore, it is not "pure speculation" that disclosing the possibility of a future early retirement benefit package to a small group of employees would interfere with Pacific's ability to participate effectively in bargaining.[1] Respondents inquired about the possibility of better early retirement plans before collective bargaining began. Resp. Opp. at 3, 6-7, 21.

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[1] *See* Resp. Opp. at 13.

Thus, by adhering to the Ninth Circuit's ruling, Pacific would have been forced to disclose before bargaining details of the several early retirement plans it considered for bargaining that may never have been proposed to the Union and thereby would have been forced to give up its right to bargain freely. *See NLRB v. Insurance Agent Int'l. Union*, 361 U.S. 477, 488-89 (1960); *New York News, Inc. v. State of New York*, 745 F. Supp. 165, 168 (S.D.N.Y. 1990) (compelling parties to set forth "their bargaining positions" will render them "unable to 'be fluid and change positions or make concessions without embarrassment or losing face'").

Respondents do not dispute these consequences. Nor do they dispute that a union can obtain an employer's bargaining strategy simply by having potentially affected employees ask what benefit changes are being considered and thereby effectively deprive employers of the ability to develop any kind of confidential bargaining strategy.

C. Respondents Do Not Refute that the Disclosure Requirement Will Undermine the Union's Role in the Eyes of its Members.

Without any basis, respondents argue that if Pacific had disclosed to them the details of the early retirement benefits it was considering negotiating with the Union, the Union's position would not have been undermined if no new early retirement benefit was agreed upon. This argument ignores common sense. If Pacific revealed it was considering a better early retirement plan and none subsequently appeared in the new union contract, a likely consequence is that the employees would have blamed the Union.

D. Respondents Ignore the Complexities of Bargaining.

Without any factual basis, respondents contend that "[t]he issue to be resolved through collective bargaining was

not whether there would be an enhanced early retirement plan, but merely how much the pension band would be increased and how much of a cash incentive would be offered," that "the company knew a cash incentive was going to be a component in any future early retirement benefit acceptable by the union," and that "Pacific knew at the time that the Respondents were considering early retirement that it was likely an enhanced early retirement benefit, in some form, would be available to them." Resp. Opp. at 7-8, 14.

As noted by the district court, Pacific did not know these things[2] and the facts are contrary. During collective bargaining, Pacific proposed converting to a Cash Balance Pension plan, which would have changed the basic plan design and given employees not yet close to retirement age more opportunity to leave with larger accrued pension benefits. It was a completely different alternative than the ERB approach. It would have affected different employees and it did not include any kind of early retirement cash incentive. Moreover, the collective bargaining process is a series of tradeoffs and no proposal is examined in isolation. Indeed, a central principle of collective bargaining is that no term of a collective bargaining agreement is final until agreement is reached on all terms and negotiations have closed. *See, e.g., United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985). Thus, until agreement on all of the terms of the contract was reached, all agreements between Pacific and the Union on particular subjects were tentative. Accordingly, a final agreement on an early retirement benefit depended not only upon the terms of the plans being proposed, but also upon the many other subjects that were being collectively bargained. It was only through the process of collective bargaining, after proposals and counterproposals had been put on the table, that Pacific

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[2] *See* App. B at 18a.

and the Union came to an agreement on an enhanced early retirement benefit plan (the ERB).

In addition, respondents attribute more knowledge to their supervisors than they had. Pacific and the Union had made an agreement not to disclose bargaining proposals outside of the bargaining table. Thus, when respondents inquired about future early retirement plans, their supervisors had no knowledge of the plans Pacific considered proposing in bargaining.

E. Respondents Do Not Refute that the Serious Consideration Disclosure Duty Will Likely Mislead and Hurt, Rather than Educate or Help, Union Employees.

Respondents argue that disclosing the possibility of improved retirement benefits to potentially affected employees "would have helped potentially affected employees make informed decisions." Resp. Opp. at 14. This argument fails to consider that uncertain information can mislead and hurt employees. For example, had Pacific made the disclosures required by the Ninth Circuit's standard, some employees might have declined the ERI Phase II offer based on a false assumption that a better early retirement plan would be offered to them in the future. Although the Union and Pacific agreed to the ERB, they also agreed Pacific could select the work groups to which it would offer the ERB, i.e., that it would not be offered to all employees to whom the ERI Phase II has been offered.

F. Respondents Do Not Refute that the Disclosure Requirement Does Not Further any ERISA Policy in the Context of Collective Bargaining.

Respondents correctly point out that the NLRA does not legislate that an employer's fiduciary obligations under ERISA are suspended during a collective bargaining process.

Resp. Opp. at 10. That, however, is not the issue. The question petitioners ask this Court to address is whether an employer's fiduciary duties require it to disclose potential changes to ERISA plans in the context of collective bargaining. It is a matter of defining the extent of the employer's duties, not suspending them.

Under ERISA, a fiduciary is generally not required to disclose changes in a benefit plan before it is adopted because "Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.'" *Muse v. IBM*, 103 F.3d 490, 494 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997) (citation omitted). The serious consideration disclosure requirement is an "exception" to this general rule to ensure that plan beneficiaries are protected from being blindsided by employer actions that are unilaterally and secretly implemented. *See, e.g., Bins II*, 220 F.3d 1042; *Fischer II*, 96 F.3d 1533. However, unilateral employer action is not a concern and is in fact a legal impossibility with respect to a benefit plan that is a mandatory subject of collective bargaining -- an argument respondents do not refute.

Nor do respondents refute that disclosure is unnecessary to further ERISA policy because the union, as the chosen bargaining agent, is charged with protecting its members' interests and the union's knowledge is imputed to its members under the law of agency. *See, e.g., Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 378 (5th Cir. 1982). *See also Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 614 (9th Cir. 1989) (principal is deemed to know what agent knows concerning matters in which agent has power to bind principal). Thus, when an employer proposes a change in benefits to the union, the employees have the

knowledge they would have obtained under the disclosure requirement.

Furthermore, respondents wrongly assert that petitioners are asking for NLRA policies to trump ERISA policies. Petitioners believe NLRA policies are as important as ERISA policies and are asking this Court to balance them appropriately. The Ninth Circuit's opinion essentially eviscerates the policies of the NLRA by requiring employers to disclose their bargaining strategy before bargaining even begins. Contrary to the Ninth Circuit's inference, ERISA is not more important than the NLRA.

G. Respondents Do Not Refute that the Serious Consideration Disclosure Standard Cannot Be Met in the Context of Collective Bargaining.

Respondents do not address petitioners' argument that the standard for meeting serious consideration, which requires that the proposal to change plan benefits be discussed "for purposes of implementation" by "senior management with the authority to implement the change," cannot properly be applied in the collective bargaining context because an employer may not implement the change in plan benefits without union approval. Rather, they merely conclude the disclosure requirement can be met because the Ninth Circuit found in this case that serious consideration began, at the latest, when Pacific tendered a proposal to the union during collective bargaining. In essence, respondents conclude the requirement can be met because the Ninth Circuit said so. Such circular reasoning is unpersuasive.

II. THERE IS A SPLIT AMONG THE CIRCUITS ABOUT REPRESENTATIONS MADE PRIOR TO "SERIOUS CONSIDERATION" ESTABLISHING BREACH OF FIDUCIARY DUTY.

A. The Misrepresentations in the Conflicting Cases are Similar to those Alleged Here.

In this case, the Ninth Circuit held that an employer can breach its fiduciary duties under ERISA by actively misinforming plan beneficiaries about whether there is a possibility of improved retirement benefits "'whether or not it is seriously considering future plan changes"' and even when the speaker "does not know whether it is true or not." App. A at 12a-13a. In arguing this rule of law does not conflict with the majority of other Circuits, respondents take language out of context to infer there were no misrepresentations in them similar to those alleged here. That is not so.

For example, in *Muse*, before the plaintiffs agreed to retire under an early retirement plan, they asked whether a better plan would be offered in the future and, based on their supervisors' "negative response," accepted early retirement. *Muse*, 103 F.3d at 492. After the plaintiffs retired, their employer offered an early retirement plan similar to that which the plaintiffs had inquired about. In conflict with the Ninth Circuit's opinion in this case, the Sixth Circuit held that "misrepresentations made *before* serious consideration" do not trigger fiduciary duties and therefore cannot be the basis for establishing a breach of fiduciary duty claim under ERISA. *Id.* at 494. Thus, the court held there was insufficient evidence to establish the employer "knowingly deceived plaintiffs about the possibility of an enhanced plan" because there was no serious consideration at the time of plaintiffs' inquiries (*id.* at 494) - not because there were no misrepresentations made, as respondents infer. *See* Resp. Opp. at 18.

Similarly, in *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir. 1997)[3], *Fischer II*, 96 F.3d 1533, and *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995), the courts found that statements similar to those alleged here had occurred, but nevertheless held the plaintiffs could not establish their breach of fiduciary duty claims under ERISA because the statements were made prior to "serious consideration."

B. This Court Should Resolve the Conflict Even if the Issue does not Resolve this Case.

Respondents wrongly contend the Ninth Circuit's ruling pertaining to misrepresentations that occur prior to "serious consideration" is not ripe. If the Ninth Circuit is reversed, alleged misrepresentations made before serious consideration will likely be excluded, which could resolve the entire case. Respondents concede alleged misrepresentations were made before collective bargaining began and the Ninth Circuit concluded "serious consideration" might have occurred when Pacific presented its ERB proposal to the Union during collective bargaining. App. A at 10a.

Even if the issue would not resolve the outcome of this case, the Ninth Circuit's holding establishes new law that can be relied upon in future cases. Because that law is contrary to the law of the majority of other Circuits, this Court should grant the writ to resolve the conflict.

Accordingly, the petition for a writ of certiorari should be granted.

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[3] Contrary to respondents' contention, Hockett did not resign before asking if he would be offered a better retirement program. *See* Resp. Opp. at 18. Rather, on several occasions before the effective date of his retirement, Hockett had asked his supervisor and a vice president whether he would receive a better package and was told such a package was unlikely. *Hockett*, 109 F.3d at 1519.

Respectfully submitted,

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Petitioners,

v.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; and CAROL JANE TIDWELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Nancy Wayne; Mary Ann Acaldo; Barbara Garvin; Karen Kendrick; Doris Ryan; and Carol Jane Tidwell respectfully pray that the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

Respondents respectfully refer this Court to the Ninth Circuit's opinion, *Wayne v. Pacific Bell*, 189 F.3d 982, 984-988 (9th Cir. 1999); App. C To Pet. For Cert. 22a-28a, for a complete statement of the relevant facts and procedural history. As explained herein, the petition fails to advance any compelling reason for granting certiorari. The Serious Consideration Disclosure Requirement does not interfere with collective bargaining. The Ninth Circuit did not create a circuit split by creating a rule against actively misinforming and deceiving plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would. Moreover, this case is not ripe for this Court's review because the rule forming the alleged, but disputed, circuit split does not necessarily determine the outcome of this case.

A. The Climate Created by Pacific

Starting in approximately December 1994, Pacific employees, including Respondents, were given the impression by Pacific that Pacific's financial condition had taken a turn for the worse. (District Court Clerk's

Record number, hereafter referred to as "CR", 54; Excerpts of Record number, hereafter referred to as "ER", 14A, p. 413; ER 14B, p. 420.) Pacific had been cutting back and downsizing. Pacific had sent voice mails to the employees notifying them who had been laid off, that the company was doing poorly, that they needed to sell more products, cut back on their use of office supplies, and to try to save Pacific money. (CR 54; ER 14A, pp. 412 and 416; 14B, p. 420; 14C, p. 426; 14D, pp. 437-438; 14E, p. 440; 14F, pp. 451-452; 14G, p. 458; 14H, pp. 463-464; 14I, p. 467; 14J, p. 476.)

Pacific held special meetings to let the employees know that in the Respondents' workgroup "head count needed to go down by 19 people" and generally what a sad state the company was in. (CR 54; ER 14C, pp. 424-425; ER 14K, pp. 479-480; 14L, p. 49; 14E, pp. 442-443; 14G, pp. 459-460.) The employees were also told that Pacific would have to lose approximately 10,000 employees in five years, that this may be the first time in the history of the company that the shareholders would not receive dividends, and that Pacific projected a loss of approximately 30 percent of its business customers when competition became a reality. (CR 54; ER 14C, p. 426.)

B. Respondents Were Offered an Early Retirement Incentive Plan

It was in this economic climate that, in May 1995, a meeting was held for a group of Pacific Bell employees, including Respondents. Respondents were told that an early retirement package was going to be offered to them. Shortly thereafter, Respondents and others were given an

information package and were officially offered the ERI II. Respondents were told they had a window period of between June 1, 1995, and June 30, 1995, to either accept or reject the ERI II plan. If they accepted, they would have to retire on the 15th day following June 30, 1995. (CR 40; ER 7A, pp. 130-131.)

Between May and the end of June 1995, the eligible employees, including Respondents, asked many questions of their managers and supervisors. They asked whether other enhanced early retirement incentives, specifically a cash incentive, would be offered in the future or whether the ERI II would be further enhanced by a cash payment. The eligible employees, including Respondents, were told directly and indirectly by Pacific supervisors and managers that it was unlikely that there would be better offers and there would certainly be no offers with a cash incentive. (CR 54; ER 14K, pp. 43-46; 14L, p. 490; 14A, pp. 414-415; 14B, pp. 420-422; 14I, pp. 471-473; 14D, p. 436; 14F, pp. 451 and 456; 14H, p. 465.)

Mike Lynch, a manager of the work group at Pacific which included the Respondents, told one of the Respondents, Mary Ann Acaldo, when she asked about possible future enhanced early retirement benefits, "Mary Ann, you're the smart one. All these other people are waiting for a bonus or for extra money. There is never going to be any money. This company can't afford to pay any money." (CR 54; ER 14C, pp. 428-430; ER 14E, pp. 444-445.) Lynch admitted during his deposition that he told employees he did not believe there would be a better offer. (CR 54; ER 14M, pp. 492-493.) Acaldo testified that she told the other eligible employees what Lynch had told her. (CR 54; ER 14C, p. 431.)

Respondent Karen Kendrick did not want to retire when the ERI II was offered so she asked her supervisor, Gladys Sanchez, whether any better offers were going to be made. Sanchez told Kendrick that she "shouldn't count on it." (CR 54; ER 14E, pp. 446; ER 14F, pp. 451.) Respondent Doris Ryan had been ill during the time the ERI II was first offered in late May 1995. When she came back to work, she was offered the ERI II. Babette Norris, her supervisor, told her it would be best for Ryan if she accepted the ERI II. (CR 54; ER 14I, pp. 466-469; ER 14J, p. 477.) Considering what Norris and Acaldo and the others told her when she returned to work, Ryan felt that she better take the ERI II because if she did not, she "would be gone with nothing." (CR 54; ER 14I, p. 470.)

Lynch also told Rita Erickson, a facilities administrator at Pacific and a coworker of Respondents, that "if you are waiting for an offer with money, you are dreaming because the company is broke." Erickson passed this information on to others. (CR 54; ER 14A, p. 415.) Respondent Nancy Wayne also asked her supervisor when she was considering whether or not to accept the offer how things looked in the company, the supervisor said that it looked "gloomy." (CR 54; ER 14A, pp. 416-417.)

Around the same time, Pacific circulated a newsletter entitled "Briefings" which was published by the California Markets Transition Team. (CR 54; ER 14N, pp. 495-498.) The team is a multi-level, multi-function group with representatives from each Pacific Bell business and support unit. The team meets with the executive vice president of Pacific Bell every six weeks. The Briefings

newsletter was the means by which the company communicated the results of the meetings to its employees.

The Briefings issue that reported on the June 6, 1995, meeting contained a section with questions by team members and answers by the Pacific executive vice president. One question asked was if an enhanced early retirement incentive program with a cash incentive would be offered. The executive vice president's answer was that it was "questionable" because of the declining surplus in the pension plan fund. (CR 54; ER 14N, p. 496.)

The answer was interpreted by some of the eligible employees to be a clear indication that the surplus pension funds were drying up so there would be no money available to fund future offers with cash incentives. (CR 54; ER 14C, pp. 432-433; 14K, pp. 481-482; ER 14E, pp. 447-448.) In fact, Pacific had a projection by their own actuary that by the year 2000, if there were no changes to the retirement program, the pension fund would be overfunded by approximately $1.6 billion. (CR 54; ER 14O, pp. 512-513, 520.)

C. An Enhanced ERB Plan Was Offered Shortly After Respondents Accepted the ERI II Plan

Respondents accepted the ERI II plan and took early retirement. Their last day of employment was July 15, 1995. During the first week of August 1995, only three weeks after Respondents retired, a new enhanced early retirement incentive program (the "ERB") was agreed upon and made a part of the collective bargaining agreement between the union and Pacific. The ERB was offered to approximately 30 Pacific employees within a couple of

months. (CR 41; ER 8G, pp. 344-350; ER 8F, pp. 341-343.) The benefits offered under the ERB contained an approximate increase of 13-14 percent in the pension benefits offered and approximately 30 percent more in the form of a cash bonus than the value of the benefits offered to the Respondents under the ERI II Plan. The ERB program would have entitled the Respondents, collectively, to approximately $386,000 more than they received under the ERI II plan. Individually, each Respondent would have been entitled to $99,241.38 (Wayne); $89,919.44 (Acaldo); $41,843.25 (Garvin); $71,334.94 (Kendrick); $26,962.74 (Ryan); and $57,077.85 (Tidwell) more than they received under the ERI II plan. (CR 53; ER 13, pp. 407-408; CR 54; ER 14T, pp. 614-654.)

D. Pacific's Negotiations With the Union Before and After the ERI II Offer

Michael A. Rodriguez was the vice president of Pacific Telesis and the chief negotiator for Pacific during the bargaining sessions with the union regarding the 1995 labor contract which included the adoption of the ERB. He had the authority from Pacific to enter into binding agreements with the union, including an agreement providing for retirement benefits. (CR 54; ER 14P, pp. 574-575.)

Pacific and the union's records of their negotiations reveal that an enhanced early retirement benefit package containing a cash incentive was formally presented to Pacific by the union and discussion of the package was placed on the agenda for the June 15, 1995, bargaining session. (CR 54; ER 14Q, pp. 584-597.) This was before

Respondents had accepted the ERI II and during the time they asked Pacific supervisors and managers whether a retirement package with a cash incentive was going to be offered.

Pacific admits that negotiations relating to an enhanced early retirement program were commenced on June 13, 1995. The union had its proposal on the table which contained a cash incentive and Pacific, having anticipated the issue, had already prepared a counter-proposal and had drafted a proposed Memorandum of Agreement which contained a cash incentive. (CR 54; ER 14Q, pp. 584-597.)

As of June 15, 1995, there is no question that Pacific was seriously considering an early retirement benefit package which would be enhanced by a cash incentive. (CR 54; ER 14P, pp. 577-578; ER 14Q, pp. 584-597.) The union had already offered its proposal which included a cash incentive component. Pacific made its counter-proposal on June 16, 1995, which included a cash incentive and an increase in the pension band. (CR 54; ER 14P, pp. 579-580; ER 14R, pp. 598-604.) The only proposals under consideration were more favorable than the ERI II offered to the Respondents.

The issue to be resolved through collective bargaining was not whether there would be an enhanced early retirement plan, but merely how much the pension band would be increased and how much of a cash incentive would be offered. On or about the same day, a proposed Memorandum of Agreement which incorporated an increase in the pension band and a cash incentive was

presented by Pacific to the union. (CR 54; ER 14P, pp. 580-581; ER 14R, pp. 598-604.)

In late 1994 or early 1995, Pacific Bell representatives, including its Director of Labor Relations, Robert Kelly, had submitted a series of projections and proposals that included a pension annuity component to a steering committee which included Rodriguez. Each of the proposals contained a cash incentive as part of the proposed early retirement benefits, i.e., money would be paid to an employee as an annuity or the employee could cash out all or part of the annuity. (CR 54; ER 14O, pp. 507-511 and 520.)

In June 1995, Kelly gave the steering committee a proposal which included a 4 plus 4, a 20 percent increased severance payment and a pension band increase. (CR 54; ER 14O, pp. 514-515, and 572.) Kelly admitted that, as of June 1995, the pension fund was well above the full funding limit. (CR 54; ER 14O, pp. 516-517.)

Considering the history of proposals and projections performed by Pacific, both well before and during the 1995 bargaining sessions, the company knew a cash incentive was going to be a component in any future early retirement benefit acceptable by the union. Yet its management represented to its employees that no cash incentive would be given in the next package if there was one. The eligible employees were told they had better "take what they could get" while they could. (CR 54; ER 14A, pp. 411-418; ER 14M, pp. 491-494; 14C, pp. 423-434; 14E, pp. 439-449; 14F, pp. 450-456; 14I, pp. 451-452.)

E. The District Court's Findings in its Memorandum of Decision

The district court made certain findings of fact in its Memorandum of Decision. Specifically, the district court made the following findings of fact:

* Respondents asked their immediate supervisors if there might be other financial incentives offered in the future (CR 59; ER 18, p. 693);

* Respondents were told that there would be no better offers and there would definitely be no offers with a cash bonus (CR 59; ER 18, p. 693);

* Pacific advertised that its financial health was poor, that downsizing was inevitable, and that the surplus in the pension plan was drying up (CR 59; ER 18, p. 693);

* On June 15 and 16, 1995, the union and Pacific traded proposals for an early retirement incentive program, both of which included a cash incentive (CR 59; ER 18, p. 693);

* The ERI II required the employees to make their election between June 1 and June 30, 1995. (CR 59; ER 18, pp. 692.)

The district court's findings of fact, and the failure by Pacific to provide the district court with any evidence to demonstrate how and why a truthful and forthright response to Respondents' inquiries would have interfered with the collective bargaining sessions, leads to the conclusion that the district court should not have granted summary judgment.

ARGUMENT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT DOES NOT INTERFERE WITH COLLECTIVE BARGAINING

Pacific's first argument is that the application of the Serious Consideration Disclosure Requirement interferes with the collective bargaining process. Essentially, Pacific would like this Court to create a rule whereby all employers are required to abide by the Serious Consideration Disclosure Requirement, except those employers who have union employees and therefore use the collective bargaining process to negotiate the ERISA benefit plan terms. There is no compelling reason why the policies of the NLRA should trump ERISA's policies in order to carve out an exception to the Serious Consideration Disclosure Requirement for employers employing union employees.

A. The Ninth Circuit's Holding That the Serious Consideration Disclosure Requirement Applies in Collective Bargaining Situations Is Consistent with Other Circuits

Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1045 (9th Cir. 2000) held that "when a plan participant inquires about potential plan changes, an employer-fiduciary has a duty to provide complete and truthful information about any such changes then under serious consideration." This rule has become commonly known as and is referred to

herein as the "Serious Consideration Disclosure Requirement." The Ninth Circuit stated in its original opinion in this case that "[p]roviding employees with information relevant to their decisions about pension benefits does not interfere with bargaining unless the employer attempts to use those communications to undermine a union's position in bargaining." *Wayne I*, 189 F.3d at 989, App. C To Pet. For Cert. 32a.

The Ninth Circuit stated in *Wayne II* that "[a]n employer attempting to undermine a union's power to bargain on behalf of its members is a far cry from communicating as a fiduciary about serious consideration of a proposal to change employee benefits under an ERISA plan. App. A To Pet. For Cert. 12a. As well, the Ninth Circuit stated such a stance is consistent with the Third Circuit's decision in *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997), in which the court stated:

> An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process (emphasis added).

The Ninth Circuit's opinion adopting the Serious Consideration Disclosure Requirement in a collective bargaining situation is also in line with the Sixth Circuit's decision in *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), where the court stated:

> The duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees. . . . A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship. A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process. (Emphasis added; internal quotations and cites omitted).

The Ninth Circuit's holding that the Serious Consideration Disclosure Requirement applies in collective bargaining situations is also consistent with a district court opinion in the Seventh Circuit, *Adamcyk v. Lever Brothers Co.*, 33 F.Supp.2d 679, 687 (N.D. Ill. 1998), where the court stated that:

> Contrary to defendant's contention, informing employees that the employer is seriously considering a severance package that will first need to be the subject of collective bargaining does not constitute an unfair labor practice.

The *Adamcyk* opinion holds that "[t]he NLRA does not preclude application of the serious consideration standard." *Adamcyk*, 33 F.Supp.2d at 687.

B. The Record on Appeal Contains No Facts Demonstrating How Disclosure of Seriously Considered Plan Changes Would Compromise the Collective Bargaining Process

Pacific did not provide the district court with any facts to demonstrate how disclosure to its employees of the likelihood there would be a future early retirement benefit package would compromise the company or interfere with the union's role as employees' exclusive bargaining agent. (CR 38-42; ER 4-9, pp. 49-380.) Further, no evidence was provided to the district court that Pacific brought its dilemma, if indeed there was one, to the attention of the union representatives and sought the union's consent to disclose the likelihood of an enhanced early retirement benefit to its inquiring employees. *Id.* Simply put, it is pure speculation that, by disclosing the likelihood of a future early retirement benefit package to a small group of employees to whom the information would be material, would interfere with Pacific's ability to participate effectively in the bargaining sessions.

C. Application of the Serious Consideration Disclosure Requirement in Collective Bargaining Situations Does Not Hurt Plan Participants

The carefully structured Serious Consideration Disclosure Requirement fashioned by the Ninth Circuit in *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (*en banc*) and delineated again by the Ninth Circuit in this case does not undermine the collective bargaining process because it does not require disclosure of the details of the union and/or employer proposals under

consideration. Pacific could have informed the beneficiaries who so inquired by merely telling them that an enhanced early retirement benefit was under consideration. Then, it would have been up to the employees to decide whether to base their decision on the "bird in the hand" (ERI II) or on the prospect that there is a "bird in the bush" worth waiting for (probable enhanced ERB). If the negotiations broke down and the ERI II remained in place, or no ERB was agreed upon, then the employer-fiduciary would have had no ERISA liability because it met its Serious Consideration Disclosure Requirement. There are no facts in this regard from which to infer that either the employer's or the union's bargaining position would have been undermined by such a simple disclosure to the appellants before June 30, 1995.

Pacific argues in its petition that the Serious Consideration Disclosure Requirement "will more likely confuse, rather than educate, employees whose benefits are being negotiated through the collective bargaining process." App. To Pet. For Cert. 23. This argument seems to indicate that Pacific has learned nothing from this experience. Pacific knew at the time that the Respondents were considering early retirement that it was likely an enhanced early retirement benefit, in some form, would soon be available to them. Both Pacific and the union had proposed retirement programs that were more favorable to employees than the existing program, and disclosing the likelihood of improved retirement benefits to potentially affected employees would not have interfered with negotiations and would have helped potentially affected employees make informed decisions.

Pacific shouldn't influence the employees' decision by withholding this information. The rule fashioned by the Ninth Circuit assures that the decision by the plan participant who asks will be an informed one. But it also protects the fiduciary from liability if the fiduciary could not have reasonably known that information was material to a particular plan participant.

D. Application of the Serious Consideration Disclosure Requirement in the Context of Collective Bargaining Does Not Undermine ERISA Policy.

ERISA imposes a duty on all plan fiduciaries to act in the best interest of plan participants. (ERISA § 404; 29 U.S.C. § 1104.) ERISA, a statute enacted after the National Labor Relations Act, does not legislate that the employer's fiduciary obligation as a plan administrator is suspended during a collective bargaining process.

Collective bargaining often goes on for a sustained period before an agreement is reached. As the Ninth Circuit has pointed out, to rule that an employer's fiduciary duties are suspended during collective bargaining would produce perverse incentives, such as tempting the employer to extend the bargaining period solely in order to avoid its fiduciary obligations. *Wayne I*, 189 F.3d at 989; App. C To Pet. For Cert. 32a; *Adamcyk*, 33 F.Supp.2d at 687.

E. The Serious Consideration Disclosure Requirement Can Be Met in the Context of Collective Bargaining

Pacific argues that, since serious consideration does not begin in the context of collective bargaining until a proposal has been accepted by the union, disclosure can not be met in the context of collective bargaining. The Ninth Circuit does not agree since it found in this case that serious consideration began, at the latest, as soon as Pacific tendered a proposal to the union during collective bargaining. Specifically, the Ninth Circuit stated, "It is unclear on this record precisely when serious consideration began, but it is at least clear that it had already occurred when Pacific presented in proposed ERB to the Union during collective bargaining on June 19, 1995." App. A To Pet. For Cert. 10a. Accordingly, the Serious Consideration Disclosure Requirement can work in the context of collective bargaining since serious consideration begins, not when a proposal has been accepted by a union, but rather when such proposal is offered to a union by an employer.

II.

THE NINTH CIRCUIT OPINION DOES NOT CREATE A CIRCUIT SPLIT

Pacific's second argument is that the rule of law set by the Ninth Circuit in this case conflicts with the rule of law in other circuits. Respondents disagree with such interpretation. The Ninth Circuit is in agreement with the First, Third, Sixth, Eighth, and Tenth Circuits that as soon as an employer-fiduciary gives "serious consideration" to a proposal to change retirement benefits, it has a duty to

disclose information about the proposal to plan participants and beneficiaries who have so inquired.

In addition, the Ninth Circuit held in *Wayne* that an employer-fiduciary may not "actively misinform" its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would. App. A To Pet. For Cert. 3a. Essentially, the Ninth Circuit found that being deceitful and actively misinforming can be material enough to equate to a breach of fiduciary duty. In so doing, did the Ninth Circuit create a circuit split? In order to answer this question, we must look at the facts of each case.

In *Wayne*, the employer actually provided misleading information to those who asked. However, no facts exist in the cases presented to the First, Third, Sixth, Eighth, and Tenth Circuits whereby the employer actively misinformed. Accordingly, the First, Third, Sixth, Eighth, and Tenth Circuits did not rule that actively misinforming can not be material enough to equate to a breach of fiduciary duty. Rather, those circuits were not even presented with such an issue.

In *Vartanian v. Monsanto Co.*, 131 F.3d 264, 267 (1st Cir. 1997), upon inquiry by a plan participant, the personnel representatives stated "they had been unable to confirm the rumors, and did not personally believe that any early retirement package was in the works." The plan participant did not dispute the truthfulness of those statements. Thus, the employer did not actively misinform.

In *Fischer*, 96 F.3d at 1537-38, the employer simply informed the participants who so inquired that no change in benefits was under consideration. The Third Circuit

found that the employer "responded truthfully to employee questions." *Id.* at 1541. No active misinformation was given to the participants with an intention to induce them to retire earlier than they actually would.

In *Muse v. IBM*, 103 F.3d 490, 495 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997), the "record [did] not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan." Moreover, the Sixth Circuit found that IBM had not "engaged in a targeted plan to deceive the plaintiffs and thus reduce their benefits." *Id.* at 495.

In *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 406 (8th Cir. 1995), the plaintiffs alleged that the employer not only breached their fiduciary duty because it failed to disclose after serious consideration, but also that the employer actively misinformed its plan participants with an intent to deceive. The Eighth Circuit found that the employees "did not meet their burden of showing misrepresentation, either intentional or negligent." *Id.*

In *Hockett v. Sun Co.*, 109 F.3d 1515, 1519 (10th Cir. 1997), there was no inducement by the employer to retire early, as the plaintiff in that case resigned prior to asking if he would be offered a better retirement package. Accordingly, there could be no active misinformation or deception to induce him to retire earlier than he otherwise would.

The facts in *Wayne* are different than the other Circuits since Pacific did actively misinform in order to induce earlier retirement. The Ninth Circuit specifically found that a reasonable fact finder could conclude that:

> There is evidence in the record that Pacific affirmatively represented to its employees that no offer of an improved benefits package would be offered when, in fact, Pacific knew that it would propose such a package to the Union and that there was at least a reasonable probability that some version of the package would ultimately be incorporated into the collective bargaining agreement. App. A to Pet. For Cert. 14a.

In so finding, the Ninth Circuit held that actively misinforming can be material enough to equate to a breach of fiduciary duty. The Ninth Circuit relied upon the Second Circuit in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), the only other serious consideration case where the employer did actively misinform and deceive plan participants to retire earlier than they otherwise would. In *Ballone*, the employer "made false assurances that future enhancements have been ruled out." *Ballone*, 109 F.3d at 124.

Upon a thorough inspection of the facts, it becomes clear that the Ninth and Second Circuits did not expand the Serious Consideration Disclosure Requirement set forth in the First, Third, Sixth, Eighth, and Tenth Circuits. Rather, the cases presented to the Ninth and Second Circuits contained facts whereby the employer was providing enough misleading information in order to equate to a breach of fiduciary duty – facts which did not exist in the cases presented to the other circuits.

III.

THE ISSUE OF A CIRCUIT SPLIT IS NOT RIPE FOR THIS COURT'S REVIEW BECAUSE THE DUTY NOT TO ACTIVELY MISINFORM EMPLOYEES, REGARDLESS OF SERIOUS CONSIDERATION, DOES NOT CONTROL THE OUTCOME OF THIS CASE

Even if the Ninth Circuit did expand the Serious Consideration Disclosure Requirement and thus created a circuit split, this case is not ripe for this Court's review because the rule against actively misinforming does not control the outcome of this case.

A. We Don't Know When Serious Consideration Of The Enhanced Plan Began.

Depending upon the factual finding still to be made by the district court on remand, it is possible for the Respondents to prevail based upon the Serious Consideration Disclosure Requirement as established in any of the Circuits. Serious consideration may have begun prior to the time Respondents made their affirmative inquiries to Pacific. The record is unclear as to this issue. This was a reason why the Ninth Circuit remanded the case for further proceedings. Specifically, the Ninth Circuit stated,

> To determine when the *Bins* duty to disclose arose, the district court must determine, irrespective of the pendency of collective bargaining, the date on which Pacific began 'serious consideration' of improved retirement benefits. App. A to Pet. for Cert. 14a.

If the district court does find that serious consideration of the ERB did begin prior to the time Respondents were

informed no enhanced plan would be offered, Respondents would prevail on the Serious Consideration Disclosure Requirement alone. Thus, whether or not Pacific actively misinformed may not be necessary to a resolution of this matter in favor of Respondents. Since the rule forming the alleged, yet disputed, circuit split would not necessarily determine the outcome of this case, the issue of a circuit split is not ripe for this Court's review.

B. We Know That There Was Serious Consideration To Offer An Enhanced Package Prior To The Time Respondents Actually Retired.

Pacific began serious consideration of the ERB at the latest on June 19, 1995. The Ninth Circuit's opinion states, "It is unclear on this record precisely when serious consideration began, but it is at least clear that it had already occurred when Pacific presented its proposed ERB to the Union during collective bargaining on June 19, 1995." App. A To Pet. For Cert. 10a. The window period to elect the ERI II lasted through June 30, 1995. Thus, there was a period of at least 11 days during which time Pacific had serious consideration of the ERB proposal, yet failed to disclose such information to the Respondents. During these 11 days, Pacific knew Respondents were relying upon their communications of 13 days earlier that a better early retirement offer would not be made in the future. The record is unclear if Respondents made repeated inquiries after June 19, 1995. Accordingly, the outcome of this case does not rely upon the Ninth Circuit's rule against actively misinforming. Rather, there was serious

consideration to offer an enhanced early retirement package prior to the time Respondents accepted the less generous early retirement plan.

These facts are in direct contrast to the facts in each related case in the various circuits. In *Vartanian*, 131 F.3d 264; *Fischer*, 96 F.3d 1533; *Kurtz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996); *Muse*, 103 F.3d 490; *Wilson*, 55 F.3d 399; and *Hockett*, 109 F.3d 1515, employees failed to show that the employer seriously considered a plan to offer enhanced early retirement benefits before such employees accepted the less generous early retirement plan. In each of these cases, serious consideration began after the employees had already accepted a different package and after they had in fact retired.

In *Vartanian*, 131 F.3d at 266, the First Circuit held that there was no breach of fiduciary duty because "no enhanced severance package that would have affected Vartanian was under 'serious consideration' at the time he retired." Vartanian retired on May 1, 1991. *Id.* Serious consideration of the enhanced severance package began on May 29, 1991. *Id.* at 272.

In *Fischer*, 96 F.3d at 1541, serious consideration of the enhanced plan began on April 7, 1990. All of the members of the plaintiff class retired before April 7, 1990. *Id.* at 1543. The Third Circuit entered judgment for defendants on plaintiffs' breach of fiduciary duty claim. *Id.*

In *Kurtz*, 96 F.3d at 1550, May 28, 1987, marked the beginning of serious consideration of an enhanced plan. Judgment was entered for the defendants on the claims of all employees who asked about a benefits change and retired before May 28, 1987. *Id.*

Likewise, in *Muse*, 103 F.3d at 491, plaintiffs retired prior to March 31, 1990. Serious consideration of IBM's increased early retirement program did not occur until after such date. Again, the employer did not seriously consider the plan prior to plaintiffs' retirement. The Sixth Circuit held no breach of fiduciary duty.

In *Wilson*, 55 F.3d at 404, plaintiffs all terminated employment on or before December 31, 1990. The Eighth Circuit found that "[a]lthough there may be some question as to when in 1991 the [increased retirement plan] was first seriously considered, there is no dispute that this consideration occurred in 1991." Once again, another case where plaintiffs lost because they all retired prior to serious consideration.

Finally, in *Hockett*, 109 F.3d at 1519, plaintiff retired effective as of July 1, 1991. Sun Company did not "seriously consider a future ERISA offering until sometime after July 1, 1991." *Id.* at 1524. Accordingly the Tenth Circuit found no breach of fiduciary duty.

The Respondents may prevail simply on the Serious Consideration Disclosure Requirement and need not rely on the rule stating that fiduciaries have a duty not to actively misinform. Since the rule forming the alleged, yet disputed, circuit split would not necessarily determine the outcome of this case, if the Court were to grant certiorari based on such a split, it would be doing so only to make a policy decision.

IV.

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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